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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 19 and 25.

**CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
and its affiliated companies,**

against

Petitioners,

NATIONAL LABOR RELATIONS BOARD,

and

Respondent,

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA,

Intervening Respondent.

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTER-
NATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION No. B-825, et al.,**

against

Petitioners,

NATIONAL LABOR RELATIONS BOARD,

and

Respondent,

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA,

Intervening Respondent.

**BRIEF FOR UNITED ELECTRICAL AND RADIO
WORKERS OF AMERICA, INTERVENING
RESPONDENT.**

LOUIS B. BOUDIN,

*Of Counsel for United Electrical and
Radio Workers of America, C. I. O.,
Respondent.*

TABLE OF CONTENTS.

	PAGE
Statement.....	1
The Findings of the National Labor Relations Board...	4
A. Background of Labor Organization Among the Consolidated Employees.....	4
B. Events Between April 12, 1937, and the "Reorganization" of the Company Unions.....	10
C. The Alleged Contracts Between the Employers and the So-Called "Labor Unions".....	17

ARGUMENT

I. The National Labor Relations Board Had Jurisdiction Over the Controversy.....	20
A. General Principles.....	20
B. The Power of Congress Over Commerce Generally.....	21
C. The Power of Congress Over the Employer-Employee Relation.....	21
D. The Relation to Interstate Commerce of the Services in Which Petitioners Are Engaged.....	22
E. The Power of the Federal Government Does Not Depend on the Proportion of the Interstate Business to Intrastate Business Involved, nor is it in any way Affected by the Legislation of the State of New York.....	23
II. The National Labor Relations Board Correctly Decided the Controversy.....	24
A. The General Attitude of the Employers Towards Labor Union Organization.....	24
B. The Activities of the Employers Herein Since April 12, 1937, Run True to Form.....	24

	PAGE
III. The So-Called Labor Unions and the Alleged Contract	25
A. The True Character of the "Labor Union" Petitioners.	25
B. The So-Called Contracts Are Wholly Fictitious	26
IV. The Order of the National Labor Relations Board Was Proper in Every Respect and Should Be Sustained.	27
A. The Order of the Board Is Based Upon Its Findings, and Every Part of It Is Necessary in Order to Remedy the Evils Found to Exist.	27
B. Neither the "Due Process" Nor the "Impairment of Obligation" Clause, Nor Any Private Contractual Rights Are Involved.	27

POINTS

PART ONE: JURISDICTION.

POINT I— <i>The general principles upon which the power of the general Government over the commerce rests are such that the correctness of the exercise of jurisdiction by the National Labor Relations Board in the instant case is beyond doubt.</i>	29
A. The Constitution Must Be Construed as of the Time of Its Application	29
B. The Meaning of the Constitution Changes Not Only With the Growth of the Country's Physical Size, But Also With the Growth of the Complexity of Its Economic Life and the Integration of Its Processes	33
C. With the Growth of the Complexity and Integration of Commerce, the Control of Concrete Means or Relations May Be Transferred from One Side of the Line of Demarcation to the Other.	40

- D. Where Interstate and Intrastate Activities Are Commingled, the Federal Power Extends to the Intrastate Activities as Such, Whenever They Affect the Interstate Activities..... 46.

POINT II—*The assumption by the National Labor Relations Board of jurisdiction in this case was in accordance with the Decisions of this Court upholding the constitutionality and defining the scope of the National Labor Relations Act.....* 53

- A. The Magnitude of the Activities Involved and Their Relation to the Commerce of the Nation 54
- B. By Reason of the Nature of the Services Performed by It, the Consolidated Edison System Is an Agency of Interstate Commerce..... 61

POINT III—*The jurisdiction of the National Labor Relations Board does not DEPEND upon the proportion of interstate to intrastate activity of the companies involved. Nor is it in any way affected by the New York State legislation on the subject.....* 64

- A. The Jurisdiction of the National Labor Relations Board Does Not Depend Upon the Proportion of Interstate to Intrastate Activities.. 64
- B. The Jurisdiction of the National Labor Relations Board Is Not in Any Way Affected by the New York State Legislation on the Subject. 67
- (a) There Was No New York State Legislation Applicable to the Case at Bar... 67
- (b) No State Legislation Could Deprive the Federal Government of Its Power in the Premises..... 68
- C. The New York State Legislation Was Designed to Aid and Not to Hamper the Operations of the National Labor Relations Act, and the State Expressly Waived Its Rights in the Premises. 69

PART TWO: THE EVIL AND THE REMEDY.

	PAGE
POINT IV— <i>The interference by petitioner-employers with the right of their employees to self-organization is conclusively and incontrovertibly established.</i>	73
POINT V— <i>Collective bargaining a la Carlisle</i>	82
POINT VI— <i>The discriminatory discharges and employment of labor spies were clearly established</i>	88
POINT VII— <i>This was not a jurisdictional dispute between labor unions, nor was the problem of representation as between bona fide labor unions in any way involved</i>	90
POINT VIII— <i>Neither the "due process" clause, nor the "impairment of obligations" clause, nor any private contractual rights are in any way involved</i>	93
A. The Alleged Impairment of Obligations of Contracts	94
B. There Was No Violation of Due Process.....	94
C. The I.B.E.W., as Such, Has No Rights Under the Alleged "Contracts".....	97
D. The So-Called Contracts Are Not Private Contracts. Indeed, They Are Not Contracts at All.....	97
(a) The Legal Character of the Alleged Contracts Prior to the Enactment of the National Labor Relations Act...	98
E. The "Collective Bargaining" Agreement Under the National Labor Relations Act.....	99
F. The Instruments Themselves Do Not Give to the Labor Union Petitioners Any Property or Rights in a Legal Sense.....	100

POINT IX—*The order of the National Labor Relations Board was proper in every respect, and the decision of the Circuit Court of Appeals upholding the same was correct* 101

CONCLUSION—*The order of the National Labor Relations Board was eminently proper, and the decision of the Circuit Court of Appeals in sustaining that order eminently correct. They should be affirmed.* 103

2

TABLE OF CASES CITED.

	PAGE
B. & O. Ry. v. I. C. C., 221 U. S. 20.....	46, 63
Brush v. Commissioner, 300 U. S. 352.....	20
Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527....	94
Conway v. Taylor, 1 Black 603.....	41, 42, 43
Fanning v. Gregoire, 16 How. 524.....	41
Gibbons v. Ogden, 9 Wheat. 1, 187-189.....	33, 34, 35
Gloucester Ferry Co. v. Penna., 114 U. S. 196.....	41, 43, 44
Hawaii v. Mankichi, 190 U. S. 197.....	96
Hopkins Savings Assn. v. Cleary, 296 U. S. 315.....	20, 71
Houston etc. Ry. Co. v. U. S., 234 U. S. 342.....	46, 48-50
Hudson v. Cincinnati, 152 Ky. 711.....	98
Hurtado v. California, 110 U. S. 516.....	33, 96
Jackson v. Steamboat Magnolia, 20 How. 296.....	31, 41
Kelso v. Cavanagh, 137 Misc. Rep. (N. Y.) 653.....	97
Knott v. Chicago, B. & Q. R. Co., 230 U. S. 474.....	47
Knox v. Exchange Bank, 79 U. S. 379.....	94
Maxwell v. Dow, 176 U. S. 580.....	96
McCulloch v. Maryland, 4 Wheat. 316, 407.....	3, 33
Missouri & M. R. Co. v. Rock, 71 U. S. 177.....	94
Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1.....	46, 63, 71
Moore v. Illinois, 14 How. 13.....	40
Munn v. Illinois, 94 U. S. 113.....	52
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1.....	25, 53, 58, 59, 60, 64
New Orleans W. Co. v. Louisiana R. Co., 125 U. S. 18....	94
New York v. United States, 257 U. S. 591.....	46, 50, 69
N. Y. C. & H. R. R. Co. v. Hudson County, 227 U. S. 248.....	41, 45, 66
Ogden v. Saunders, 12 Wheat. 213.....	94

	PAGE
Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S.	
1.	36, 37, 38, 39
Pennsylvania v. Williams, 294 U. S. 176.	71, 72
Prigg v. Pennsylvania, 16 Peters 539.	40
Propeller Genesee Chief v. Fitzhugh, 12 How. 443.	31, 32, 41
Railroad Commissioners v. Chicago, B. & Q. Ry. Co., 257 U. S. 563.	46, 50, 66
Railroad Commission v. Texas & P. Ry. Co., 229 U. S. 336.	46, 50, 51
Santa Cruz Fruit Packing Co. v. National L. R. Bd., 58 S. Ct. 656.	65
Simpson v. Shepard, 230 U. S. 352.	46, 47, 48
Sinking Fund Cases, 99 U. S. 700.	94
Southern Ry. Co. v. U. S., 222 U. S. 20.	46, 63
Steamboat Thomas Jefferson, 10 Wheat. 428.	31
Texas & N. O. R. Co. v. Brotherhood Ry. & S.S. Clerks, 281 U. S. 547.	82
United States v. Hill, 248 U. S. 420.	71
Wells v. Monihan, 129 N. Y. 161.	97
Western Union Tel. Co. v. James, 162 U. S. 650.	36, 40
Western Union Tel. Co. v. Pendleton, 122 U. S. 347.	39
Western Union Tel. Co. v. Speight, 254 U. S. 17.	36
Western Union Tel. Co. v. Texas, 105 U. S. 460.	36, 39
Wicks v. Monihan, 130 N. Y. 232.	97
World Trading Corp. v. Kolchin, 166 Misc. Rep. (N. Y.) 854.	97

STATUTES.

Interstate Commerce Act of 1887.	44
National Labor Relations Act:	
Section 7.	73
Section 8.	73
Section 8 (2)	91, 92
Section 10 (E)	88
New York Consolidated Laws, Chap. 31, Art. 20, Sec. 7154.	70
Transportation Act of February 28, 1920.	66, 69

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BRIEF FOR 'UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA, INTERVENOR- RESPONDENT.

Statement

These are petitions by employers and certain organizations of workers referred to as "labor unions," to review the decision of the United States Circuit Court of Appeals for the

Second Circuit, affirming an order of the National Labor Relations Board, directing *the employers* to cease and desist from continuing certain unfair labor practices. The order of the National Labor Relations Board was based upon certain findings of fact and conclusions of law made after an extended hearing, held in pursuance to a certain Charge filed by the United Electrical and Radio Workers of America, the present respondent, with the National Labor Relations Board, and a Complaint made by the said Board based thereon. The Charge (R. 4) was filed on May 5, 1937. The Complaint (R. 7) was filed on May 12, 1937.

The Charge as well as the Complaint was directed solely against the employers, although the matters complained of included certain actions of the employers involving the petitioner International Brotherhood of Electrical Workers (hereinafter referred to as I.B.E.W.). Due notice of the hearings ordered by the National Labor Relations Board on the Complaint was given to the employers (R. 17), and a copy of the Complaint and Notice of Hearing was also served on the I.B.E.W.* In pursuance to the said notice, the employers appeared by special appearance, disputing the jurisdiction of the Board, but after the said objection was overruled, they answered (R. 42), and their counsel conducted the hearings on their behalf. The I.B.E.W. did not participate in these hearings, but had actual knowledge of the same, and its counsel and other representatives actually attended some of the hearings (R. 1715). After the order of the Board was made, the "labor union" petitioners applied to the Circuit Court of Appeals for permission to intervene, which permission was granted, but they did not ask for any further hearings. Nor did the employers ask the Circuit Court of Appeals to direct further hearings, although they complained

* On May 12, 1937, the Board's Regional Director at New York City, although not required to do so by the Act, caused a copy of the complaint and notice of hearing thereon to be served on the I.B.E.W. by Western Union Telegraph Messenger Errand Service addressed to 103 East 25th Street, New York City. (The number "103" was an error and was intended to be "130" as shown below.) Receipt of the complaint and notice of hearing was acknowledged on the delivery ticket as follows: "Loc. 3, I. B. E. W. D. Kaplan," under date of May 12 (R. 18-19). Thereafter, on May 25, the amended notice of hearing was served upon the I.B.E.W. by registered mail, return receipt requested, at 130 East 25th Street, New York City (R. 35). As to these facts there is no dispute.

that further hearing had been improperly shut off by the Board with respect to one of the matters involved.

The gravamen of the charge made by the present respondent was that the employers had violated the rights of their employees to self-organization in various ways, principally by preventing or discouraging them from joining the present respondent and encouraging or coercing them into joining the "labor union" petitioners,* which are claimed to be mere devices for the continuation of company unions theretofore established and maintained by the employers. The principal provisions of the order of the Board direct the employers to cease and desist from continuing their unfair labor practices and particularly from discouraging their employees from joining the present respondent and from impeding their organization by means of a certain alleged contract claimed to exist between the employers and the "labor unions." It also directs the reinstatement with back pay of six employees, who, the Charge charged, and the National Labor Relations Board found, had been discharged by the employers because of labor union activities.

The facts relating to the question of jurisdiction were stipulated by the parties, and the stipulation appears at pages 1318 to 1388 of the Record. The most important facts thus stipulated will be referred to further below when we come to consider the question of jurisdiction. The consideration of the charges of unfair labor practices were the subject of extended hearings and are set forth at large in the first three volumes of the Record, but the basic facts are substantially undisputed (except with respect to the causes for the discharge of the six employees)—even though there may be a dispute as to their legal import.

*At the time the present respondent filed its Charge with the National Labor Relations Board, it was not aware of the existence of the "labor union" petitioners other than the International Brotherhood of Electrical Workers, and it is believed that the other "labor union" petitioners (the so-called "local unions" numbered B-825, B-826, B-828, B-829, B-830, B-832, B-839) were not then in existence. Just when they came into existence does not appear clearly from the Record. The first definite notice of their existence was acquired by the respondents when the employers sought to introduce the alleged contracts in support of their plea that the case had become moot. This did not occur until the hearings had been closed as far as the respondents were concerned, and remained open only for the employers, for the special purpose of adducing certain evidence which was not available at the time of the close of the hearing on June 24, 1937 (R. 1187).

The Findings of the National Labor Relations Board.

A. Background of Labor Organization Among the Consolidated Employees.

In order to determine the exact import of the conduct of the employers, which is the direct factual basis of the charges of unfair labor practices against them, reference must be had to the history of their attitude towards unionization of their employees. This history may be summarized in the statement that they have consistently been opposed to the unionization of their employees; that so long as the right of workers to self-organization was not guaranteed by law no labor union organization of their employees was tolerated by them; and that when this right was recognized and guaranteed by law they did everything to evade the spirit of the law while pretending to comply with its letter.

The Findings of the Board commence with the time when self-organization by workers was first recognized and partially guaranteed by the provisions of the National Industrial Recovery Act. The history itself commences, of course, much further back. Fortunately, the Record gives us a glimpse of that history to a point some ten years further back, and what it reveals throws a flood of light upon what followed after the enactment of the NIRA, and particularly on what has happened since the decisions of this Court upholding the constitutionality of the National Labor Relations Act. For that light beats not only on the employers, but also on the I.B.E.W., going far to explain the role of that organization in the "emergency" created by that decision. In attempting to explain the extraordinary course pursued by the petitioners-employers after the decisions of this Court on April 12, 1937, Mr. Carlisle, who was in charge of the labor relations of the employers, said that, in casting about for a "legal" organization with whom his companies could do "collective bargaining," it was "natural" for him to turn to the I.B.E.W., because of previous "contractual relations", and an attempt was made by him to create the impression that these "contractual relations" meant the usual relations

5

between employers and labor unions. But upon further inquiry we discover that the "contract" in question was to the effect that *the I.B.E.W. would not organize the Consolidated Edison employees.* The "contract" itself, which was entered into in 1924 and was put in evidence by the employers as their Exhibit 23, is, unfortunately, not printed in the Record. But Mr. Carlisle's testimony gives its general nature,—and there is no mistaking that. His testimony on this point follows:

"We had had important relationships with the No. 3 local in all the work, which is very huge, that we did in the change-over of consumer premises, we had long standing relationships with them.

"Q. Were those relationships contractual? A. They were relations which had the form of exchange of letters. Our agreement in substance was this: That none of our men would do work on the premises of a customer where it was a change-over of anything for the purpose of going off from the D.C. distribution system to the alternating current system. That ran into many millions of dollars a year.

"Judge Ransom: I will produce a copy of that agreement, if you wish.

"The Witness (Mr. Carlisle): We would have to continue that in the future.

"Q. (By Mr. Moscovitz) *That was not a collective bargaining contract, was it?* A. No, but it was a very normal and natural thing.

"Q. It had something to do with construction, didn't it? A. Well, but the time between where the company is spending normally \$10,000,000.00 a year in expansion program, there has been a policy of changing over the apparatus on consumer premises. *There was a deadline agreed to across which they would not go.* * * *

"Q. Yes. But this Local No. 3 arrangement, so that I can be clear in my mind, was not a collective bargaining arrangement. It was simply a construction arrangement so there wouldn't be any— A. *It was an agreement whereby we would not put our own men into work that otherwise would be very natural and very logical for us to do.*

"Q. Yes. A. To that extent it was a recognition, and a very decided recognition.

"Q. Was it a relationship where the I.B.E.W. was representing your employees? A. No" (R. 1245).

The "deadline" referred to by Mr. Carlisle was the outside boundary line of, or, rather, fence around, the Consolidated's labor force. It is this line or fence that the I.B.E.W. agreed in 1924 not to cross, *and it never did*. No wonder Mr. Carlisle and his associates were satisfied with their relations with the I.B.E.W., as Mr. Carlisle testified in another place. No wonder, also, that when the avowed company unions had to be given up, Mr. Carlisle's thoughts naturally turned to the I.B.E.W.

"I had no other thought in my mind," testified Mr. Carlisle as to what happened upon the rendering by the United States Supreme Court of its fateful decisions upholding the constitutionality of the National Labor Relations Act, "but what the *logical, natural and proper* arrangement was to make the arrangement with the I.B.E.W." (R. 1245).

We may now turn to the history of the "organization" of Consolidated's employees from the time when some form of organization became imperative upon the enactment of the National Industrial Recovery Act.

That Act became a law on June 16, 1933. Following that, in the latter part of 1933 and the early part of 1934, organizations known as Employee Representation Plans were established by the companies comprising the Consolidated Edison System among their employees. These Plans were formed, as the Board expressly found, "as a means of purported compliance with the National Industrial Recovery Act and the codes adopted thereunder for the power industry." That these Plans were mere travesties upon the rights guaranteed by the National Industrial Recovery Act, is apparent from the manner in which they were established and maintained, as expressly found by the National Labor Relations Board. The findings hereinafter quoted relate to the manner in which the Plan was established by one of the companies; but the

Board found that the manner of the establishment of the Plan by the particular company, Bronx Gas and Electric Company (now part of Consolidated Edison Company of New York), is typical of the Plans established by all of the companies. The manner of the establishment of the Plan among the employees of the Bronx Gas and Electric Company, as found by the Board, was as follows:

"One day in the latter part of 1933, during working hours, several employees of Bronx Gas and Electric Company were notified by their supervisors to report to the president and the vice-president of the Company. On their arrival they were informed by the president and the vice-president that they, the employees, had been sent on this mission by their fellow employees for the purpose of instituting a procedure for collective bargaining. They were given petitions to circulate among the employees for signatures. The petitions bore captions stating in substance that the subscribers desired to have a poll among the employees to determine upon the establishment of a means of collective bargaining. Harold Straub, one of the employees engaged in procuring signatures, testified that his foreman placed a company car at his disposal for contacting employees and that he devoted two full days to the task, for which he was paid his regular salary as a lineman. After sufficient signatures to the petitions had been obtained, a poll was conducted among the employees on the question whether they desired the establishment of the Plan, which had been drafted and distributed by the Company, as a means of collective bargaining. The question having been decided affirmatively, the election of officers was held shortly thereafter. Practically all the employees became members of the Plan, as it was the current sentiment that such action accorded with the desire of the Company" (R. 86).

The constitution and by-laws of the Plan in question stated that its purpose was "to provide means by which employees of the Company, through representatives of their own choosing, may deal collectively with the management of the Company" and that "collective bargaining under this Plan may

relate to wages, hours of labor, working conditions," etc. But, as a matter of fact, as the Board found, *no meetings of either the members of the Plan or of their functionaries, was ever had with management for the purposes of bargaining collectively, either as to wages, hours of labor, or other working conditions.* In fact, the Record does not disclose that any meetings of the members of the Plan were ever held or provided for by its constitution or by-laws,—the business apparently being entirely in the hands of a system of councils and their chairmen. As to what the latter did, the findings of the Board are as follows:

"On several occasions meetings of the chairmen of all the general councils were called by the respondents for the purpose of imparting information to be reported to their constituents, but never for the purpose of bargaining collectively as a unit. Thus in July 1936, Carlisle, chairman of the board of trustees of Consolidated Edison Company of New York, Inc., and member of the board of directors of each of the respondents herein, called such a meeting to inform it of the restoration of a former pay reduction and, in December 1936, to inform it that there would be no Christmas bonus as had been rumored."

The action of the companies in establishing the Employee Representation Plans, the spirit which moved them, and the aims and purposes sought to be achieved, can only be understood if we correlate this action to the attempt of the employees at self-organization and the attitude of the companies towards these attempts. The attempts at self-organization by the employees and the attitude of the companies towards them are aptly summarized in the following excerpt from the Findings of the National Labor Relations Board:

"In the early part of 1934, approximately coincidental with the establishment of the Plans, there was formed a labor organization among the employees of the respondents, known as the Brotherhood of Utility Employees, herein called the Independent Brotherhood. It was a national organization, but certain of its locals limited their membership exclusively to the respondents' employees. All six employees named in

the amended complaint as having been discriminatorily discharged were members of the Independent Brotherhood, while several of them were organizers of Local No. 103, which had jurisdiction of the employees of New York and Queens Light and Power Company. All six were also members of the Plans and at least one was for a time an officer of the Plan at New York and Queens Light and Power Company. In 1935 certain of these six employees, as stated hereinafter, formulated a petition of grievances, dealing principally with wage increases, for presentation to the management of New York and Queens Electric Light and Power Company. After overcoming the reluctance of the general council, it was finally presented to the management, but nothing was done concerning it. During the same period the Plan members of one of the departments of Consolidated Gas Company, Inc., set up a committee, headed by two members of the Independent Brotherhood, to investigate the Plan with respect to company domination and pursuant to its mandate the committee filed monthly reports of company domination. Convinced that the Plans were dominated by the respondents, the Independent Brotherhood issued and distributed magazines, pamphlets, circulars, and leaflets attacking the Plans as company-dominated unions. Representatives of the Independent Brotherhood also attended all the hearings before the New York Public Service Commission, involving such matters as rates, and claimed an interest therein by reason of their representation of respondents' employees.

"Failure to achieve any success as an independent organization induced the several locals of the Independent Brotherhood in March 1936 to consolidate and affiliate with the I.B.E.W. as one local, Local No. B-752. In March 1937 the members of Local No. B-752 voted to affiliate with the United and thereupon one local, Local No. 1212, was chartered with jurisdiction over only employees of the respondents. All the members of Local B-752 became members of the United Local No. 1212. Local No. B-752 was thereupon suspended by the I.B.E.W. In April 1937 the United announced the formation of a utility division and commenced a vigorous campaign to organize the respondents' employees.

"At this juncture the respondents instituted a campaign to procure signatures of employees to cards designating their desire for the continuance of the Plans. This campaign was interrupted by the decisions of the United States Supreme Court sustaining the validity of the National Labor Relations Act, for thereupon the respondents discontinued their campaign and abruptly altered their labor policy, as described below." (R. 89).

To this should be added the further findings of the Board with respect to the discharge of the six employees hereinbefore referred to and considered further below, which clearly show a deep-seated animosity on the part of the petitioners-employers towards self-organization by their employees, and carefully designed plans to decapitate any such organization whenever it dared raise its head.

B. Events Between April 12, 1937, and the "Reorganization" of the Company Unions.

With this background in mind, we may now turn to the events following the decisions by the United States Supreme Court on April 12, 1937, in the cases upholding the constitutionality of the National Labor Relations Act, which are the basis of the charges of unfair labor practices investigated and sustained by the National Labor Relations Board. These events are thus stated by the Board in its Findings:

"After the United States Supreme Court on April 12, 1937, rendered the decisions sustaining the validity of the National Labor Relations Act, Carlisle, who was in charge of the respondents' labor policy, had two conferences concerning the recognition of the I.B.E.W. with D. W. Tracy, the International president of the I.B.E.W. On April 16, 1937, Tracy dispatched a letter to Carlisle demanding recognition of the I.B.E.W., accompanied by a proposed contract providing for recognition of the I.B.E.W. as the representative of its members, a five per cent increase in wages, and a procedure for settling grievances which outlawed strikes and lockouts. On the morning of April 20, 1937, Carlisle called a convention in the board room of Consolidated Edison Company of New York, Inc.,

of the members of all the general councils of all the Plans, at which he announced that in view of the decisions of the United States Supreme Court a continuance of the Plans with the financial support of the respondents would constitute a violation of the spirit of the National Labor Relations Act, and more particularly, of the provisions of the Doyle-Neustein Bill, which he termed a little Wagner Act, which was then pending in the Legislature of the State of New York and appeared almost certain of enactment. He informed them that therefore he intended to recognize the I.B.E.W. In response to questions from the floor, Carlisle declared that employees were free to join any labor organization, but that the respondents intended to recognize the I.B.E.W. Various comments from the floor indicated that the Plan representatives considered the sudden recognition of the I.B.E.W. as a means of coercing them into transferring their allegiance to the I.B.E.W. Carlisle refused the request of several Plan representatives for a delay of the recognition of the I.B.E.W. until the employees had an opportunity to discuss the matter.

"Harold Straub, chairman of the general council of the Plan at Bronx Gas and Electric Company, asked Carlisle whether it was not true that he had hitherto considered unions as unnecessary evils, but now, in view of the United States Supreme Court decisions and the pending Doyle-Neustein Bill, as necessary evils, and as between the I.B.E.W. and the United he preferred that the employees join the I.B.E.W. Carlisle said that this was a very apt statement of his position. Straub testified that Carlisle stated to him also that he thought that the Labor Relations Board of the State of New York would be composed preponderantly of men in sympathy with the American Federation of Labor and hence that it was the part of wisdom to recognize the I.B.E.W. When Carlisle, himself, testified, he was not specifically questioned on direct examination concerning Straub's testimony on these particular points. Straub also asked Carlisle why recognition was being accorded the I.B.E.W. when its membership among the respondents' employees was negligible. Carlisle replied that the I.B.E.W. had some members and would soon have a great many more. Carlisle, himself, testified that at the time he recognized the I.B.E.W. he knew that its

organization among the respondents' employees was incomplete and that the formation of locals and the procurement of membership was to follow recognition and that when that was accomplished contracts with the various locals would be executed. He also testified that at this time he knew that the members of Local B-752 had transferred their allegiance to the United which had commenced a vigorous campaign for membership. It is quite clear that recognition of the I.B.E.W. under these circumstances was intended as a blow to the United, as an aid to the I.B.E.W., and as a strong indication to the employees of the union favored by the respondents.

"After Carlisle left the conference he dispatched a letter to Tracy recognizing the I.B.E.W. along the lines of the proposed contract. News of this letter appeared in the early afternoon papers, which led many of the Plan representatives to believe that he had formally recognized the I.B.E.W. even before he had called the conference of general councilmen. The conference continued for a time after Carlisle's departure, and speeches were made characterizing recognition of the I.B.E.W. as a design to force the employees into the I.B.E.W. Upon the adjournment of the conference, the general councilmen proceeded to a meeting of the general council of Consolidated Edison Company of New York, Inc., where the chairman narrated the above events. The general opinion of this meeting also was that recognition of the I.B.E.W. was intended to force membership in the I.B.E.W.

"On the afternoon of the same day, Straub called on Colonel Stillwell, vice-president of Consolidated Edison Company of New York, Inc., with whom Straub, as chairman of the general council of the Plan at Bronx Gas and Electric Company, had discussed Plan matters since the merger of the latter company in 1936 into Consolidated Edison Company of New York, Inc. Stillwell said that recognition of the I.B.E.W. would be a blow to the Committee for Industrial Organization, of which the United was an affiliate, and was so intended, and that it would be a wise move for the Plans and the employees to go over to the I.B.E.W. and obtain control of it. Upon Straub's request he gave him the name and address of G. M. Bugniazet, International secretary of the I.B.E.W., with whom

he could confer concerning ways and means of switching the Plan at Bronx Gas and Electric Company over to the I.B.E.W. The following day Straub called at the address, but merely discussed the aims and policies of the I.B.E.W. with a representative of the I.B.E.W. Later that same day Straub called a meeting of a number of members of the Plan at the Bronx Gas and Electric Company and informed them of his actions. He found among them a strong sentiment for the United and for an independent union with no outside affiliation, while several of them complained that their foremen were applying pressure in behalf of the I.B.E.W.

"On the following day, April 22, a conference of 400 employees, mostly members of the various general councils, who, as we have already indicated, were always free to leave their work for Plan affairs, was held in the auditorium of Consolidated Edison Company of New York, Inc., building on Irving Street. Carlisle had been invited to attend, and while awaiting his arrival the men discussed the matter. Three views were presented. Some favored the I.B.E.W., others the United, and others an independent union with no outside affiliation. A motion for a secret ballot on the question among those present at the conference was carried. William P. Ganley, co-chairman of the general council of the Plan at Consolidated Edison Company of New York, Inc., and presiding officer of this meeting, took no action, however. The meeting was adjourned to the company's cafeteria where Ganley read a telegram from Tracy indicating the manner in which the various Plans could come into the I.B.E.W. as locals with the Plan officers as officers of the locals. The meeting growing somewhat restive, a messenger was sent to summon Carlisle. Upon his arrival Carlisle was subjected to such a barrage of questions that the procedure was adopted of formulating three questions which were addressed to Carlisle by Ganley. The questions and answers were substantially as follows:

Question: Could a vote be taken among the respondents' employees on the matter?

Answer: If such a vote implied that the respondents would bear the expenses of the election, it could not.

Question: Would he stop department heads and foremen from coercing employees into joining the I.B.E.W.?

Answer: Since he had not issued any order to do so, he would not issue any order to stop.

Question: Why were I.B.E.W. organizers allowed to enter the plants and solicit employees during working hours while United organizers were denied that privilege?

Answer: The respondents have never policed their buildings and did not intend to begin now.

"A shout from the floor accusing Carlisle of having 'sold 40,000 employees down the river' evoked considerable applause.

"Carlisle departed and shortly thereafter, upon adjourning, Ganley announced that there would be another meeting on the following day for the purpose of forming an independent union. A meeting for such purposes was apparently never held, but a meeting of the general councilmen of the Plan at Consolidated Edison Company of New York, Inc., called by Ganley, was held in the board room of the company. At this meeting, Ganley and a number of Plan officials decided to see Tracy at the Hotel Roosevelt in New York City. Tracy informed them that the I.B.E.W. intended to establish seven locals and that each of the Plans could shift over to the I.B.E.W. as a corresponding local, retaining Plan officers as officers of the local. The Plan officials returned to the meeting and 22 general councilmen signed a petition for an I.B.E.W. charter. They then went back to Tracy and a local was chartered. Such was the birth of Local B-829. Thereafter, on May 4, 1937, the 22 signers of the petition held an election among themselves and elected the officers of the Plan to comparable positions in Local B-829.

"After Local B-829 was chartered on April 23 the officials and councilmen of the Plan at Consolidated Edison Company of New York, Inc., availing themselves to the full of their privileges as Plan officials to devote full time to Plan affairs, commenced a campaign for membership in the I.B.E.W. and were paid their regular salaries by the company. Straub, at first attracted by the idea of going over to the I.B.E.W., grew lukewarm. In the election of May 4 he refused a position as an officer in Local B-829, but con-

tinued to assist in procuring members and collecting dues, devoting a large portion of his working hours to the task and receiving his regular salary from the company. He was reproached by Ganley, who had become president of Local B-829, for lack of enthusiasm. Finally, on May 14, he joined the United.

"In his talk with Stillwell on April 20, Straub had asked to be transferred to a job under different supervisors, but still in his home area, The Bronx, because in his capacity of chairman of the general council he had antagonized certain supervisors who, upon the dissolution of the Plan, would make it uncomfortable for him. On May 21, 1937, he was transferred to cable-splicing in Manhattan. Upon inquiry he was informed that the transfer was the result of large shifts of workmen in the respondents' system. In this fashion, after he had joined the United and proved himself an obstacle to I.B.E.W. organization in The Bronx, he was transferred from his home area where his influence with the employees was greatest.

"The establishment of all the locals of the I.B.E.W. substantially conformed to the pattern of the establishment of Local B-829, with most of the officers of the Plans throughout the respondents' system becoming officers of the corresponding I.B.E.W. locals and continuing to exercise their privilege as Plan officers for several weeks after the I.B.E.W. locals were chartered, devoting all their working hours to I.B.E.W. organization, using the respondents' officers and secretarial services, and utilizing the respondents' expense accounts. During all this time they were paid their regular salaries by the respondents.

"Evidence specifically adduced at the hearing discloses that the respondents pursued additional methods of coercing their employees into membership in the I.B.E.W. The department heads and foremen during working hours solicited employees to join the I.B.E.W. and generally assumed the role of I.B.E.W. organizers. The sanction behind the solicitation was clearly revealed in the accompanying advice and admonitions to the effect that the respondents desired them to become members of the I.B.E.W. and that sensible employees would conduct themselves accordingly.

"The respondents allowed to I.B.E.W. organizers free access to all the respondents' buildings and per-

mitted them to solicit employees individually and in groups during working hours, while similar privileges were denied to United organizers. I.B.E.W. delegates were also permitted to collect dues on the respondents' premises. They availed themselves, for that purpose of offices of foremen or other offices or rooms and, in some instances, hung signs upon the doors bearing the legend Pay A. F. of L. Dues Here. Later the practice of hanging up such signs was discontinued and foremen adopted the practice of telling the employees to go down to some office on the premises and pay their dues. Similar privileges were denied to the United.

"I.B.E.W. officers remained in the employ of the respondents, exercising their Plan prerogatives in behalf of the I.B.E.W., for several weeks, and it was only shortly prior to the execution of the contracts between the respondents and the I.B.E.W. locals that they resigned from the respondents' employ to become full time I.B.E.W. officers paid by the I.B.E.W. Carlisle testified that the respondents permitted the Plan officers to retain their offices and to exercise their prerogatives in order to give them an opportunity to wind up their affairs. It appears from the evidence, however, that the respondents knew that the Plan officers had shifted over to the I.B.E.W. and had utilized their Plan prerogatives in behalf of the I.B.E.W. Moreover, it is clear that the respondents had intended as much. Carlisle also testified that he had given no orders to the respondents' department heads and foremen to act in behalf of the I.B.E.W. Express orders, however, were unnecessary as the respondents' position had been made abundantly clear, with the result that their supervisors took the steps appropriate for its attainment.

"The evidence reveals the delineations of the respondents' design to dictate to their employees the choice of their bargaining representative. The first step was to favor the I.B.E.W. by according it recognition at a time when its membership was negligible and its organization hardly commenced and when the respondents knew that the United was the only active labor organization among its employees. The next step was to deliver over the Plan organizations to the I.B.E.W. by making the respondents' position in the matter clear to the Plan representatives. Then

followed the organizational drive in behalf of the I.B.E.W. by department heads, foremen, and Plan representatives, leading up to the stage of organization contemplated by Carlisle and Tracy as sufficient to justify the execution of contracts."

C. The Alleged Contracts Between the Employers and the So-Called "Labor Unions."

The petitioners claim that between May 28th and June 24, 1937, certain agreements were entered into between the seven separate corporations constituting the Consolidated Edison System, and the seven alleged "local unions" of the I.B.E.W.* The Board found that these so-called contracts were mere devices to prevent self-organization on the part of the employees involved. They were in fact part of the scheme to continue the company unions, and to prevent the employees in question from joining the present respondent. On this head, the Board found as a matter of fact, as follows:

"It is clear from the evidence that the contracts were not the result of unhampered bargaining, but were rather the culmination of a plan by the respondents to select the I.B.E.W. as the exclusive representative of the respondents' employees and at the same time deal a blow to the United which they opposed. Carlisle's interpretation of the contracts, despite the

*The National Labor Relations Board in its findings states (R. 99) that these contracts were entered into between May 28th and June 16th, and the Circuit Court of Appeals makes a similar statement. This error is due to the secretiveness of the petitioners with respect to these "contracts,"—secretiveness not only with respect to their contents, but also with respect to their execution. As already stated, these "contracts" were not produced until after the close of the actual testimony taken at the hearings, and were offered by the respondents in evidence in support of a plea that the case had become moot by reason of their execution. But even then they were not frank about what had actually happened. As appears from the footnote to the Findings of the Board on page 100 of the Record, counsel for employers produced only six contracts, stating that the seventh contract (between Consolidated Telegraph & Electrical Subway Company and "B-828") "was substantially similar to the above contracts and executed during the same period,"—i. e., between May 28th and June 16th. As a matter of fact that "contract" had not been executed at the time. It was actually executed on June 24th (R. 1623). But neither the Board nor the present respondent knew anything about it until after the "labor union" petitioners had filed their petition for review in the United States Circuit Court of Appeals and annexed this "contract" as a part of Exhibit "I" to that petition. Apparently, also, none of the "contracts" were delivered before June 15th or 16th, for those which bear an earlier date contain riders dated June 15th (R. 1581-1640).

express limitation of the representation of the I.B.E.W. to its own membership, discloses the force of the blow dealt the United, namely, the denial of the opportunity to bargain collectively with the respondents during the life of the contracts." (R. 102).

The Board also made the following statement, under oath, in its Answer to the Petition of the "labor unions":

"Further answering, the Board avers that said contracts are wholly invalid and contrary to law in that they were not entered into in good faith by the companies aforesaid, composing the consolidated system parties thereto and respondents to the order issued by the Board, but followed upon a course of action on the part of said companies intended to and which in fact did intimidate and coerce their employees into joining the petitioner International Brotherhood of Electrical Workers (hereafter called the Brotherhood) or one or more of its affiliated petitioner unions, and more particularly that said companies immediately following their withdrawal of financial support from certain Employee Representation Plans announced their recognition of the Brotherhood and expressed their preference that their employees join said Brotherhood, despite the fact that at that time they were aware of the meagre membership of their employees in the Brotherhood, despite the fact that at that time they knew that the members of Local B-732 of the Brotherhood had transferred their allegiance to and had become members of Local 1212 of the United Electrical and Radio Workers of America, despite the opinion expressed by certain representatives of their employees that the sudden recognition of the Brotherhood was a means of coercing them into joining that union, and despite the request on behalf of their employees for a withholding of recognition of the Brotherhood until the employees had an opportunity to discuss the matter. Nevertheless said companies continued in their expressed purpose and, following recognition of the Brotherhood, permitted officers of the various locals thereof, department heads, and foremen to devote full or part time, as required, to campaign for membership therein among and collect dues from said employees during working

hours and on the companies' time, drawing their regular salaries from the companies nevertheless. This practice continued up until a short time before the companies entered into the formal contracts with petitioners, and notwithstanding the companies' lack of definite information as to the number of their employees that were members of the petitioner unions, the companies nevertheless executed the aforementioned contracts. It was not until June 29, 1937, after the contracts were executed and the presentation of the Board's case in the proceedings before it had been completed, that the companies received a statement from the Brotherhood of its membership totals, but notwithstanding that this membership statement showed that one of the locals—Local B-829—did not represent a majority of the 13,200 employees eligible for membership therein, the companies nevertheless continued to treat the contract with said Local B-829, as they did all of their contracts with petitioners, as an exclusive collective bargaining agreement in that they would not enter into collective bargaining agreements with any other labor organization during the life of said contracts. Under all of the facts and circumstances the Board was justified in concluding that the companies did and intended to impose the Brotherhood upon their employees to the exclusion of the United Electrical and Radio Workers of America or any other labor organization, and that under all of the facts and circumstances of this case the said contracts were invalid and contrary to law" (R. 1712-1713).*

* In their briefs counsel for petitioners state that the so-called "local unions" involved herein comprised about 30,000 of their employees out of a possible 40,000, as if that were a proven fact in the Record. As a matter of fact, there is no such testimony in the Record. In fact, there is no testimony, whatever of the actual membership of these alleged "local unions." What does appear in the Record is a self-serving declaration, made not under oath and by a person who was not called as a witness and was not subject to cross-examination, on behalf of the "labor union" petitioners to a representative of the employers, claiming such membership. This claim was made after the evidence had been closed, and there was, therefore, no way of contradicting or disputing it.

ARGUMENT.

I.

The National Labor Relations Board Had Jurisdiction Over the Controversy.

A. *General Principles.* The Constitution must be construed as of the time of its application even though that application is controlled by the intentions of the framers as to the nature of the government they were establishing, and the general distribution of powers thereunder. While the division of power between state and nation must be maintained, the power of the National Government of necessity grows at the expense of the States with the physical growth of the country and with the growth of the interdependence of its parts due to economic progress and the complications of modern life. This is particularly true in the domain of commerce: Because of the physical growth of the country, of new inventions which change the relations of the parts of the country to each other as well as the relation to each other of the different components of commerce *within* the same parts of the country, interstate commerce is a constantly growing concept that requires constant adjustment to new conditions. Furthermore, "interstate commerce" is a matter of the *relationship* of things and not of things themselves. The same *thing or activity* may, therefore, be both *interstate* commerce and *intrastate* commerce, dependent upon its relation to other things and activities, or the particular aspect which is involved in the governmental action under consideration. Specifically, a thing may be *intrastate* commerce for the purpose of *taxation* and *interstate* commerce for the purpose of *regulation*.*

* Because of these well-recognized distinctions we deemed it unnecessary, in the discussion of cases in the latter portion of this brief, to burden this Court with the discussion of obviously inapplicable cases cited on the briefs of counsel for the petitioners and relating to other branches of our constitutional law, such as *Brush v. Commissioner* (300 U. S. 352), from the field of taxation, and *Hopkins Savings Association v. Cleary* (296 U. S. 315), belonging to the field of local government.

B. The Power of Congress Over Commerce Generally.

The Constitution makes a grant of power over interstate and foreign commerce to the General Government, *but does not specifically reserve anything to the States*. The intention of the Framers was clearly to vest *plenary power* in the General Government, and to leave to the States only what is not necessary in order to accomplish the *object* of the grant of power to the General Government. The *regulatory* power of the General Government, is, therefore, not limited to what may be strictly or technically termed interstate commerce, but includes *intrastate* commerce, insofar as that is necessary in order to give full scope to the regulatory functions of the General Government. It is on that principle that *intrastate* rates of common carriers may be prescribed by an agency of the Federal Government when that is deemed necessary in order to remove discriminations as to persons and places in interstate commerce. The power of the Federal Government over commerce is not, however, *limited* to regulations, but is *plenary* in the sense that it empowers the Government to take measures for the *aid* and *encouragement* of that commerce, provide for its security, and protect it from interruptions or interferences. It is on that principle that *intrastate* rates of common carriers may be prescribed by an agency of the Federal Government for the purpose of producing a revenue sufficient to maintain an adequate carrying system in interstate commerce.

C. The Power of Congress Over the Employer-Employee

Relation. The power of Congress over the employer-employee relation does not depend upon the employer's being in interstate commerce, but extends over all employers whose activities *affect* interstate commerce, or the interruption of whose activities may injuriously affect that commerce. Also, that power extends to taking measures *in advance* to insure the continuance of those activities. Congress, therefore, has power not only to take measures to prevent interruptions of commerce actually threatened, but also to prescribe *modes of conduct looking to the prevention* of such interruptions. The purpose of the National Labor Relations Act is to es-

establish *general modes of conduct* which would operate in industry continuously, thereby removing interruptions of, or threats of interruption to, commerce. The powers and jurisdiction of the National Labor Relations Board do not, therefore, depend upon the actual threat of a strike in the particular instance, but on the effect of the kind of conduct complained of on peace in industry generally. The Act in question, and the powers granted thereby to the Board, are intended to act as *preventatives* and not as *cures* only.

D. *The Relation to Interstate Commerce of the Services in Which Petitioners Are Engaged.* In considering the problem of jurisdiction of the National Labor Relations Board over the employer-employee relationship involved in this case, several aspects must be taken into consideration: (1) The *nature* of the service rendered or activity engaged in by the Employers in its relation to interstate commerce; (2) the position which the Employers in question occupy with relation to interstate commerce generally; (3) the *magnitude* of the activities involved, which makes their continuance a matter of *national concern*.

While the Consolidated Edison System does not technically engage in interstate commerce, it is, nevertheless, an *Agency* of interstate commerce. The services which the employers herein render literally *make the wheels of commerce run*. One of the activities of the employers herein is to furnish the *motive-power* which sets in motion through-trains on great interstate transportation systems and the entire motive-power for some lesser ones. It furnishes the physical *motive-power* which controls the nerve centers of the nation's commerce, such as the New York Stock Exchange, the Dow-Jones Ticker Agency, and the principal telephone, telegraph and radio agencies. It also furnishes light, heat, and/or power, to many instrumentalities of foreign commerce, such as illumination for the Port of New York, including light-houses, piers and other facilities of transatlantic and coastal shipping. It also furnishes the physical motive-power, as well as light and heat, for all governmental services in New York City, including its postal service.

Besides being an *Agency* of and direct participant in interstate commerce and foreign commerce, the general activities of the Consolidated System are of such *magnitude* as to make the cessation of its activities a matter of national concern even insofar as they may be said to be purely local. These activities include not only light and heat for the inhabitants of the great City of New York, which make their life within the City and their commercial activities therein possible, but also the motive-power or energy for a large portion of its industrial and commercial activities, the cessation of which would most injuriously affect the commerce of the nation.

In addition, the Consolidated System purchases immense quantities of supplies which come to it in interstate commerce, and it produces large quantities of by-products which go into interstate commerce,—the two items being of such magnitude as to substantially affect interstate commerce.

E. *The Power of the Federal Government Does Not Depend on the Proportion of the Interstate Business to Intrastate Business Involved, nor is it in any way Affected by the Legislation of the State of New York.* Where interstate and intrastate activities are commingled, there is a distinction between cases involving *production and distribution of commodities* on the one hand, and *instrumentalities and agencies of commerce* on the other. In the first class of cases, the proportion of the commodities going into or distributed in interstate commerce may be of importance; although even then it is not a decisive consideration, and the magnitude of the interstate commerce involved may be decisive even though its proportion to the entire commerce involved be small. But in the case of *instrumentalities and agencies of commerce*, the proportion can never be taken into consideration, and the agencies and instrumentalities of interstate commerce are exclusively within the control of the Federal Government, irrespective of the proportion of the interstate service to the intrastate service.

Nor is the Federal power in such a case in any way affected by state legislation. In case of conflict the Federal

power is supreme. In the instant case, however, *there is no such conflict*, since the New York State Labor Relations Act was not in effect at the time the present controversy arose, nor did it cover the matters in controversy. Furthermore, that Act was passed *in aid* of the Federal legislation involved herein, and it makes specific provision for the retiring of the state agency when the Federal agency takes jurisdiction.

II.

The National Labor Relations Board Correctly Decided the Controversy.

A. The General Attitude of the Employers Towards Labor Union Organization. The history of the labor relations of the employers herein conclusively proves their general hostility towards self-organization by their employees. Up to the enactment of the National Industrial Recovery Act, the employers herein did not tolerate any organization of their employees, and many years prior to the enactment of that Act, they entered into an agreement with Local 3, I.B.E.W., which in effect guaranteed the non-organization of their employees. Upon the enactment of the National Industrial Recovery Act they caused to be organized pretended labor organizations, now conceded to have been company unions. These were continued after the enactment of the National Labor Relations Act until April 12, 1937, when this Court upheld the constitutionality of that Act. During all of that period, the employers herein ruthlessly suppressed every effort of their employees towards self-organization.

B. The Activities of the Employers Herein Since April 12, 1937, Run True to Form. For some time prior to April 12, 1937, United Electrical and Radio Workers of America (referred to as "C. I. O.") entered upon a campaign of organization among the employees of the Consolidated System, which met with the usual hostility of the System to independent labor organization among their employees. Immediately after the announcement by this Court of its

decision in the *Jones & Laughlin* case, the petitioners herein got into communication with each other, and this resulted in an announcement by the Consolidated System to its employees on April 20, 1937, that Consolidated "recognized" the I.B.E.W. as the exclusive bargaining agency for all of its employees, numbering some 40,000. At that time, none of the employees involved belonged to the I.B.E.W. Up to that time, I.B.E.W. had shown no interest in the organization of utility employees, and its only New York City "local" was under contract with Consolidated not to organize its employees.

Immediately after the said announcement, and in pursuance to the policy thus announced, I.B.E.W. is supposed to have entered upon an "organization campaign" among the employees involved, which is supposed to have produced the unheard of marvel of organizing some 32,000 employees of the Consolidated System into seven "locals" of I.B.E.W. The Record shows that what actually happened was that the Consolidated instituted a campaign of "organization,"—really terrorization,—which had the result of transforming the seven previously existing company unions into seven alleged locals of I.B.E.W., except for such defections as resulted from those organizations because of the decision of this Court, which assured to the workers the right to self-organization. The Record clearly demonstrates that the activities pursued by the employers herein since April 12, 1937, were a continuation of their "labor policy" formed and pursued prior to that date, which can be summarized as "hostility to independent labor organization."

III.

The So-Called Labor Unions and the Alleged Contract.

A. *The True Character of the "Labor Union" Petitioners.* It is not claimed that International Brotherhood of Electrical Workers is not a bona fide labor union. *It is claimed, however, that the other "labor union" petitioners, the so-called "Locals" of I.B.E.W. are not bona fide unions, but*

merely the old company unions under new labels. The Record shows that for reasons of its own, I.B.E.W. agreed to sell to the employers herein fig-leaves,—euphemistically called *charters*,—whereby the company unions could cover their shame and appear in the guise of independent labor organizations. The Record conclusively proves that there was no change in organization, but that the previously existing seven "Employee Representation Plans" were continued in operation with their old set of officers after the re-christening, and that that was done in pursuance to an agreement entered into prior to the "chartering." The Record shows that the agreement of "recognition" included an agreement for the continuation of the company unions. The so-called "local union" petitioners herein were not in existence at the time the present controversy arose, except as avowed company unions, and they have no other existence today.

B. *The So-Called Contracts Are Wholly Fictitious.* The National Labor Relations Board found that the so-called contracts between the employers petitioners and the "labor union" petitioners were not made in good faith, and that their real purpose was to defeat self-organization among the employees of the Consolidated Edison System. These findings are amply borne out by the Record, which shows that these "contracts" were the culmination-point of an elaborate system of pretense and make-believe, designed, on the one hand, to raise a smoke-screen of independent union organization and supposed "jurisdictional disputes," and, on the other, for the purpose of entangling this case, if possible, in the meshes of the "due process" clause, and the law applicable to "contractual rights." The Record shows that the actual "contract" was entered into between Floyd G. Carlisle and Daniel W. Tracy at a private conference held on or about April 19, 1937, and that whatever happened afterward was merely done in pursuance to and in order to carry out that contract.

That contract may have been one of "bargain and sale," but it was not a "collective bargaining" contract. At that time Tracy did not represent any of the employees involved.

and had no mandate from them to enter into any contract with the employers herein. The contract thus entered into was contrary to the public policy of the land and utterly void. Everything done in pursuance to that contract or in order to carry out its purpose, is similarly void.

IV.

The Order of the National Labor Relations Board Was Proper in Every Respect and Should be Sustained.

A. *The Order of the Board Is Based Upon Its Findings, and Every Part of It Is Necessary in Order to Remedy the Evils Found to Exist.* The National Labor Relations Board found three kinds of unfair labor practices indulged in by the employers herein: labor espionage; discharges of particular employees because of union activities; and discouragement and prevention of self-organization on the part of their employees by coercing them into joining pretended labor organizations of the employers' own creation, which would render "collective bargaining" nugatory. All these evils had to be remedied, and the order is directed to that purpose. The interference with self-organization could not be stopped without "disestablishing" the illegal "contract." Its "disestablishment", was the only efficacious remedy, and it was the duty of the Board to order it.

B. *Neither the "Due Process" Nor the "Impairment of Obligation" Clause, Nor Any Private Contractual Rights Are Involved.* The "impairment of obligation of contracts" clause of the Constitution clearly is not involved. Nor is the "due process" clause, either in its procedural or substantive aspects.

The argument under this head must be divided into three parts: first, whether or not any contract existed; second, if the contract existed, who were the parties to it; and third, what was the nature of the contract. If, as the Board found, the contract was not entered into in good faith but was only part of a scheme to circumvent the law, there was in effect

no contract. Fraud vitiates any contract. So does the repugnance to public policy.

Assuming, however, that contracts in fact existed, the only parties to these contracts under the laws of New York were the employers and the so-called "local unions." If they were "property," they were the property of the "locals" and not of the I.B.E.W. Neither the "locals" nor the contracts were in existence at the time the proceedings herein were commenced. The procedure provided by the Act and the Board are ample, and constitutionally adequate to protect the rights of an "aggrieved party," but neither I.B.E.W. nor "locals" sought this protection at any stage of the proceedings. Clearly, therefore, they cannot complain with respect to any question of procedure whereby the order with respect to the "disestablishment" was made by the Board and confirmed by the Circuit Court of Appeals.

Nor, is there any problem of substantive private rights, because the "contracts" are not private contracts and do not give rise to private rights. On general principles, as well as because of *their provisions*, these "contracts" are nothing but public treaties, establishing a norm or relationship between the employers and their employees. Neither property rights nor private contractual rights of any of the "labor union"-petitioners are in any way involved. The only rights involved are the rights of the "local unions" to act as "bargaining representatives" of certain workers in their relations with their employers. These rights are not a matter of private contract, and are regulated by law. The law whereby they are regulated is the National Labor Relations Act. Any contracts contrary to that Act are void and confer no rights whatever. On the other hand, any rights which the "labor union"-petitioners may have under the provisions of that Act are fully protected by that Act, and may be enforced in a proper proceeding under Section 9 of that Act.

POINTS.

PART ONE: JURISDICTION.

POINT I.

The general principles upon which the power of the general Government over the commerce rests are such that the correctness of the exercise of jurisdiction by the National Labor Relations Board in the instant case is beyond doubt.

We respectfully submit that the correctness of the action of the National Labor Relations Board in assuming jurisdiction in this case is beyond doubt. An examination of the general principles of the exercise of power by the National Government over commerce, as these principles have been enunciated from time to time by this Court, demonstrates two propositions: first, that the division between *interstate* and *intrastate* commerce is neither definite nor permanent; and, second, that the same thing may be *interstate* commerce in respect to one situation or exercise of power, and *intra*-state commerce with respect to another situation or exercise of power. As we shall see further below, this is not a peculiarity of the Federal power over commerce, but applies generally to the division of power between the Federal Government and the States. It is inherent in the very nature of our Constitution. But it is particularly applicable to the power over commerce, because of the nature of the subject over which the power is exercised,—commerce being a constantly changing thing, and the direction of its change being constantly towards *nationalization and integration*.

A. The Constitution Must Be Construed as of the Time of Its Application.

"General propositions do not decide concrete cases." Nevertheless, certain general principles apply to all questions of power arising under our Constitution. And, we re-

spectfully submit, that the first of these principles, is, that the Constitution must be construed as of the time when it is applied, even though it must be so construed in the light of the *general intent and purpose of those who framed it*. In other words, in construing the Constitution, we must bear in mind that the Constitution merely provides general principles of division of power between states and nation, but does not contain any specific line of demarcation whereby one can immediately tell whether a certain concrete matter is one the one side of that line or on the other. This is a self-evident proposition: The Constitution was adopted in 1787, and the controversy herein arose in 1937. The Framers could not possibly have foreseen the concrete problem with which we are confronted here. But we know the kind of government they sought to establish, and the problem before the Court is the correct application of the intent of the Framers with respect to the kind of Government they sought to establish to the concrete problem which is involved herein.

In this connection, two things must be remembered,—one is, that the purpose of the Constitution was to establish “a more perfect union”; and the other is, that the moving force in the establishment of the Constitution was the necessity to make this country a *unified whole with respect to commerce*. In considering any question of power of the Federal Government, the Constitution must, therefore, be considered not as an ordinary legal document,—that is to say as a private grant of power from one person to another, such, for instance, as the appointment of an agent for a concrete purpose,—but as establishing a mode of life for the people for whose benefit the Constitution was intended, insofar as their governmental arrangements are concerned. The powers granted by the Constitution to the Federal Government must, therefore, of necessity be continually on the increase with the growth of the country in extent, and the nationalization of its mode of life. This has been recognized from the beginning of the existence of this country as a nation under the Constitution.

It is this thought that is expressed in the classic admonition of John Marshall that—

"In considering this question, then, we must never forget that it is a Constitution we are expounding."

McCulloch v. Maryland, 4 Wheat. 316, 407.

The wisdom of this admonition was demonstrated, and its correct application exemplified, in connection with commerce, even though the question arose not under the commerce clause but the admiralty clause of the Constitution. The fundamental change in the admiralty jurisdiction of the Federal Government involved in the cases discussed below, was as striking as anything that has ever occurred under the Constitution. The great significance of that occurrence lies in the fact that it involved not a mere enlargement or extension of Federal jurisdiction, but a definite transfer of concrete matters across the line which separates State jurisdiction from Federal jurisdiction, *in face of the fact that concededly the subject involved had been considered by the Framers as being within the power of the States rather than the power of the Federal Government.*

Steamboat Thomas Jefferson, 10 Wheat. 428.

Propeller Genesee Chief v. Fitzhugh, 12 How. 443.

Jackson v. Steamboat Magnolia, 20 How. 296.

In giving the opinion of this Court in the *Genesee Chief* case, which accomplished the revolution in question, Marshall's great successor said that he was expounding the meaning of the Constitution as it was understood at the time of its adoption, notwithstanding the fact that, concededly, at the time of the adoption of the Constitution admiralty jurisdiction was limited to tidewater. This statement contained neither contradiction nor subterfuge. Chief Justice Taft was stating a correct principle of constitutional interpretation as applied to the subject in hand,—*that principle being, that the great object of the Constitution, to give to the National Government power over national affairs, cannot be defeated by the fortuitous circumstance that a certain*

concrete matter was conceived by the framers of the Constitution as being within the State power, and was intended by them to be within the State power as matters then stood. Had matters stood still, the correct meaning of the Constitution would have been the same a half-century after its adoption that it was in 1787. But matters did not stand still. The country had grown in the meantime. Therefore, what was concededly on the State side of the line of demarcation in 1787, didn't belong there any more; and was, therefore, transferred by Congress, with the approval of this Court, to the Federal side of the line. Said this Court in giving the reason for the transfer:

"These lakes are in truth inland seas. Different states border on them on one side and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes."

Propeller Genesee Chief v. Fitzhugh, 12 How. 443, 453.

The best statement of the general principle here involved that we can think of was made by Mr. Justice Matthews speaking for this Court in one of the cases cited further below in another connection. This statement is as follows:

"It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in Murray v. Land & I. Co. . . ."

"The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the

law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

Hurtado v. California, 110 U. S. 516.

B. The Meaning of the Constitution Changes Not Only With the Growth of the Country's Physical Size, But Also With the Growth of the Complexity of Its Economic Life and the Integration of Its Processes.

The general principles enunciated by this Court in the cases quoted above are particularly applicable in cases arising under the commerce clause of the Constitution. Indeed, it was the commerce aspect of the problem that decided the change in the admiralty jurisdiction of the Federal courts, even though the cases arose under a different clause of the Constitution. And when *facts* are taken into consideration rather than *words*, *McCulloch v. Maryland* also involved the commerce of the nation; even though the power invoked in establishing the Bank of the United States was not the commerce clause, and commerce was not made a ground of decision by this Court. The Bank of the United States,—whatever the particular power invoked in its establishment,—was a commercial institution; and its establishment was part of the economic and financial legislation devised and supervised by Alexander Hamilton. But it was only natural that the general principles here invoked should have been enunciated by this Court in cases arising directly under the commerce clause. The first, and in a sense the most comprehensive, statement of those principles, is contained in John Marshall's opinion in *Gibbons v. Ogden*. Every word of that famous opinion is, of course, familiar to this Court. But in view of the special plea made in that portion of the briefs of the petitioners dealing with the legislation of the State of New York, and the invocation of the Tenth Amendment as a limit upon the power of the Federal Government in this case, it is well to bear in mind that in *Gibbons v. Ogden*, this Court was overruling decisions of the courts of the State of

New York one of which was rendered by one of the greatest jurists ever produced by that State and by this nation. The occasion of the controversy was so important,—the controversy being with the State of New York,—and the authority of the decision reviewed so great, that this Court was impelled to use the following significant language by way of preliminary statement to its decision:

"The state of New York maintains the constitutionality of these laws; and their legislature, their Council of Revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names—*by names which have all the titles to consideration that virtue, intelligence, and office, can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority*; but it is the province of this Court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government."

But neither the conflict with the State of New York nor the authority of the great jurists who rendered the decisions being reviewed were sufficient to obscure the great matter at stake, namely, *the authority of the nation over its commerce*. As a result, this Court announced the latitudinarian or liberal rule which has ever since been applied to this subject. Said Chief Justice Marshall, speaking for the Court:

"It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution which has been pointed out by the gentlemen of the bar, or which we

have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. * * * If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. *The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.*"

Gibbons v. Ogden, 9 Wheat. 1, 187-189.

It was only natural that such a rule should be resisted as applications of the same to new situations arose from time to time. Economic change is resisted not only by those whose interests lie with the past, but also by those whose habits of mind have been formed in the past. New situations, therefore, arouse not only clashes of interests but also clashes between modes of thought; and the interests opposed to the

change are magnified by the modes of thought which see in every change a dangerous cutting off from ancient moorings possibly leading to disaster. But after the change has been accomplished, those who opposed it are themselves frequently surprised how easily the nation had become adjusted to the change, and occasionally they admit that the change has worked well. Thus the Nation marches on on the road of Progress.

This is well illustrated in the attitude of the legal profession and the courts to problems arising from the introduction of *new instrumentalities* of commerce, in an endeavor to adjust them to a line of demarcation,—or what is thought to be a line of demarcation,—drawn at the time when those instrumentalities were unknown and could not have been comprehended within the scheme of division. The telephone and telegraph are examples in point.

Pensacola Tel. Co. v. West. U. Tel. Co., 96 U. S. 1.

West. U. Tel. Co. v. Texas, 105 U. S. 460.

West. U. Tel. Co. v. James, 162 U. S. 650.

West. U. Tel. Co. v. Swoight, 254 U. S. 17.

The first of these cases is interesting not only because it shows a new application of the commerce power which was resisted by old interests and modes of thought relying on old decisions of the courts, but also because it involved the relation of the power of Congress over commerce to existing contracts,—the decision being that the power of Congress is free of any impediments due to existing contractual relations or rights claimed thereunder. The facts in that celebrated case are well known and need not be restated here. But attention should be called to the fact that the gravamen of the argument of counsel for the Pensacola Company was that even if Congress had the power to establish and regulate telegraph companies engaged in interstate commerce, it could not so legislate “as to authorize the appellee to invade the exclusive franchise granted to the plaintiff by the State of Florida”. But that plea was of no avail. In giving its decision in favor of the exercise of power by the Federal

Government, and its freedom from impediment by State legislation or contractual obligations, this Court said through Chief Justice Waite:

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the General Government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation.

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. *It is indispensable as a means of intercommunication but especially is it so in commercial transactions.* The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured and the movement of ships directed. *The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.*

"It is not only important to the people, but to the Government. By means of it, the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry,

what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile state legislation * * *

"The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all."

Pensacola Tel. Co. v. West. U. Tel. Co., 96 U. S. 1.

That the contractual feature of the case was serious, is evidenced by the fact that Mr. Justice Field stressed it in his dissenting opinion. But it is the argument against the extension of the power of Congress that is of main interest to us here, and that portion of Mr. Justice Field's dissenting opinion which deals with that subject is most significant in that regard: Every new application of the power of the Federal Government over commerce was met not only with stubborn opposition, but every argument in opposition was made to the refrain—"what next?" and "where is the limit?" Said Mr. Justice Field:

"If by making a contract with a party to carry the mails over a particular road in a State, which thus becomes by Act of Congress for that purpose a post road, Congress acquires such rights with respect to the road that it can authorize corporations of other States to construct along and over it a line of telegraph, *why* may it *not* authorize them to construct along the road a railway, or a turnpike, or a canal, or any other work which may be used for the promotion of commerce? If the authority exist in the one case, I cannot see why it does not equally exist in the other. And if Congress can authorize the corporations of one State to construct telegraph lines and railways in another State, it must have the right to authorize them to condemn private property for that purpose. The Act under consideration does not, it is true, provide for such condemnation; but if the

right exist to authorize the construction of the lines, it cannot be defeated from the inability of the corporations to acquire the necessary property by purchase. The power to grant implies a power to confer all the authority necessary to make the grant effectual. It was for a long time a debated question whether the United States, in order to obtain property required for their own purposes, could exercise the right of eminent domain within a State. It has been decided, only within the past two years, that the government, if such property cannot be obtained by purchase, may appropriate it, upon making just compensation to the owner, *Kohl v. U. S.*, 91 U. S. 367; but never has it been suggested that the United States could enable a corporation of one State to condemn property in another State, in order that it might transact its private business there."

But less than ten years later, Mr. Justice Field delivered the unanimous opinion of this Court in the *Pendleton* case, holding unconstitutional a statute of the State of Indiana, which attempted to regulate the delivery of telegraph messages *within that State*. In his opinion in that case, Mr. Justice Field quoted with approval the following passage from the opinion of this Court in the *Texas* case:

"A telegraph company occupies the same relation to commerce as a carrier of messages, that the railroad company does as a carrier of goods. Both companies are instruments of commerce, and *their business is commerce itself*. They do their transportation in different ways, and their liabilities are in some respects different; but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

West. U. Tel. Co. v. Texas, 105 U. S. 460.

West. U. Tel. Co. v. Pendleton, 122 U. S. 347.

The above quoted passage is significant in that it shifts the ground of the exercise of Federal power from the "post roads" provision of the Constitution to that which gives the National Government power over commerce,—or at least shifts the emphasis. This is important in our connection,

because in the case at bar the object of the Act of Congress is to preserve and protect interstate commerce, and the service involved in the dispute furnishes the motive-power for the operation of the Western Union Telegraph Company and Postal Telegraph Company both in their interstate and foreign commerce.

The last of the group of cases cited above dealing with the telegraph is significant in another respect,—a respect which bears directly on the problem of division of power between state and nation. It is usually assumed,—and the assumption underlies much of the reasoning of the briefs for the petitioners herein,—that the exercise of power of Congress is an interference with the local affairs of the States wherever the interstate and intrastate activities overlap or are commingled, thereby depriving the State of legitimate power to regulate their own affairs. But that is clearly not so; The true principle is, that in such situations the States are only deprived of the right to *so* regulate local affairs as to interfere with the exercise of Federal power. But the States may pass any legislation either in aid of the Federal power, or in the proper regulation of their local affairs, provided it is not in conflict with the exercise of power by the Federal Government over the same subject. This principle was well recognized in the decisions of this Court in the period preceding the Civil War.

Prigg v. Pennsylvania, 16 Peters 539.

Moore v. Illinois, 14 How. 13.

And it was reaffirmed in connection with the telegraph as an instrumentality of commerce in—

West. U. Tel. Co. v. James, 162 U. S. 650.

C. With the Growth of the Complexity and Integration of Commerce, the Control of Concrete Means or Relations May Be Transferred from One Side of the Line of Demarcation to the Other.

The discussion in the preceding sections dealt mainly with new situations arising either from the physical growth of the

country, or the invention or introduction of new instrumentalities of commerce. Insofar as it indicated transfers "across the line," it was mainly a mental operation, in the sense that it did not involve the transfer of actual physical objects, but only a mental determination that certain objects or situations which would theretofore have been thought to be on the one line belonged on the other. But there is a line of cases in which there was an actual physical transfer, so to say, from one side of the line of demarcation to the other, —the line of cases which deals with ferries and ferriage.

Fanning v. Gregoire, 16 Howard 524;

Conway v. Taylor, 1 Black 603;

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196;

N. Y. C. & H. R. R. Co. v. Hudson County, 227 U. S. 248.

The first two of these cases affirmed the proposition, universally held by the profession until long after the Civil War, that ferries and ferriage were "local" in their nature, and, therefore, entirely within the domain of state jurisdiction. The revolution effected by the *Gloucester Ferry Case* was as great in the domain of this branch of the law as that effected by the *Genesee Chief Case* in the admiralty law. In a sense, indeed, it was much greater,—for the *Genesee Chief* and *Steamship Magnolia* cases dealt not only with a new situation but with new matters. Not only the shipping on the Great Lakes, but those lakes themselves were hardly present in the minds of the framers of the Constitution. The shipping in question didn't exist at all, and the Great Lakes only existed as part of the continent upon which the United States was situated,—they were certainly not part of the country which adopted the Constitution in any presently real sense. But the Gloucester ferry, or its predecessor, was certainly there when the Constitution was adopted; and so was the ferry involved in the Hudson County case, or its predecessor. And it is beyond doubt that when the Constitution was adopted these ferries were considered, and by the Constitution meant to be, within the domain of state power. Yet,

they are not so now,—and mainly because of decisions of this Court. That does not mean that this Court had misinterpreted the Constitution. On the contrary, there can be no doubt of the fact that this Court correctly interpreted the meaning of the Constitution by applying the principle which had been applied earlier in the admiralty-jurisdiction cases. For the true *intent* of the framers of the Constitution and the *meaning* of the document framed by them, is, that ferries and ferryage were in 1787 within the domain of state jurisdiction, and should remain such as long as the *situation* remains the same,—that is to say, as long as their *relations to commerce* remain substantially the same; but that they should become part of the Federal domain when the situation had changed to such an extent as to make ferryage, at least in certain instances, a matter of national concern because of its relation to national commerce.

A brief examination of these cases will, therefore, prove enlightening.

Conway v. Taylor was a bitterly contested case, and was argued with great learning and ability by two of the leading lawyers of the day, Henry Stanbery and Edward M. Stanton. The opinion of this Court was unanimous,—to the effect that ferries are wholly “local” even though they involve ferryage across rivers forming the boundary line between two states; and that the regulation of these ferries is, therefore, entirely within the competence of the abutting states. The concluding portion of the opinion of this Court in that case is particularly significant. Said the Court:

“The counsel for the appellees has invoked the authority of *Cooley v. Wardens of Phila.*, 12 How., 299, in which a majority of this court held that, upon certain subjects affecting commerce as placed under the guardianship of the Constitution of the United States, the States may pass laws which will be operative till Congress shall see fit to annul them.

“In the view we have taken of this case, we have found it unnecessary to consider that subject.

“There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution,

had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any Act of Congress which involves the exercise of this power.

"That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the States respectively,' we think too clear to admit of doubt.

"We place our judgment wholly upon that ground."

Conway v. Taylor, 1 Black 603, 635.

But twenty-three years later this Court unanimously decided the other way in the *Gloucester Ferry Case*, transferring jurisdiction over ferries and ferriage crossing rivers forming boundary lines between States across the dividing line between Federal and State jurisdiction,—and that without the aid of Congress. In *Conway v. Taylor* this Court held that the circumstance that Congress had not exercised its power over this class of ferriage was proof of the fact that it possessed no such power. During the twenty-three years intervening between the decision of the two cases Congress had not acted. Nevertheless, this Court held in the *Gloucester Ferry Case* that the non-action of Congress was proof not of lack of power, but rather as proof that Congress intended that commerce to remain free. But not only were the decisions not necessarily in conflict, even the reasoning was not necessarily contradictory. Before the Civil War Congress may well have refrained from acting because of a belief that it had no jurisdiction, if the problem ever presented itself to the collective mind of Congress. The chances are that because of the situation then existing no thought whatever was given to the subject. But by 1883 the matter had become of national importance. The silence of Congress in view of the new situation certainly permitted the inference that Congress intended the commerce to be free.

Of one thing there certainly can be no doubt,—and that is that something had happened to change the meaning of the Constitution with respect to ferries and ferriage. The country still remained the same as far as extent is concerned.

The ferries, or at least the rivers which they crossed, were still in the same place. But the nature of the commerce of the nation, its *integration*, had become such as to make this class of ferries a matter of *national interest and concern*. This transferred the power to regulate this class of ferryage from the States to the Federal Government. It gave a *new meaning* to the Constitution in accordance with the *old principles* applicable to the construction of that document.

The last of the group of cases dealing with ferries is particularly in point in the controversy now before this Court. The *Gloucester Ferry Case* merely decided the general principle, and made a certain application of the same,—namely that ferryage between states being interstate commerce, the abutting States could not tax that commerce. But the problem of *regulation* is different from that of *taxation*. The States cannot tax interstate commerce, but they can regulate it when it is commingled with intrastate commerce, in the absence of Federal regulation; and in certain respects the States may even extend their supervision to purely interstate commerce if the purpose is not to *regulate* but to exercise what is commonly called their “police power.” The *Gloucester Ferry* decision did not, therefore, exclude the States from regulating interstate ferryage insofar as it had been left unregulated by Congress, where regulation is necessary in order to protect the “local” interests. The Hudson River ferry case did not involve taxation but regulation. It was claimed, however, that Congress had regulated that commerce by enacting the Interstate Commerce Act of 1887, which included “railroad ferries” within the purview of that Act. The Interstate Commerce Commission had not, in fact, acted with respect to the subject matter. But it was claimed that because of the Interstate Commerce Act, the Interstate Commerce Commission was the only one that *could* act. In this connection certain facts are important. The ferry in question was not one which carried any trains of the railroad involved. The terminal of the West Shore Railroad, the railroad in question, was in Weehawken, New Jersey. But the railroad company operated the ferry in question as an

adjunct of its railroad, and the ferry was used for the transportation of passengers from the railroad terminal in New Jersey across the Hudson River to the New York shore. But it was not used exclusively for that purpose,—the large majority of the passengers using the ferry were not railroad passengers, but “local,” i. e., foot-passengers travelling to and from the City of New York. The regulation of the State authority in question related solely to these “local” passengers, and had nothing to do with the railroad passengers. Nevertheless, this Court held the local regulation void at the instance of the railroad company, because of the relation of the ferry to interstate commerce. The problem of the nature of the traffic across the Hudson River as, in itself, interstate commerce, was not involved,—because that was clearly not within the purview of the Act of Congress. The following language of this Court, speaking through Chief Justice White, is important in our connection:

“We think—said this Court—the argument by which it is sought to limit the operation of the Act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit. * * * Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the power of congress and the power of the states over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate.”

N. Y. C. & H. R. R. Co. v. Hudson County, 227 U. S. 248, 264.

D. Where Interstate and Intrastate Activities Are Commingled, the Federal Power Extends to the Intrastate Activities as Such, Whenever They Affect the Interstate Activities.

It is now well settled by the adjudications of this Court that whenever interstate activities involved in or relating to commerce are commingled with intrastate activities, the Federal power extends to the regulation of the intrastate activities as such, if that becomes necessary in the course of the regulation of the interstate activities. This principle underlies the decisions of this Court with respect to the regulation of intrastate rates of common carriers and the labor relations of interstate carriers.

Railroad Commission v. Texas & P. Ry. Co., 229 U. S. 336.

Simpson v. Shepard, 230 U. S. 352.

Houston etc. Ry. Co. v. U. S., 234 U. S. 342.

Railroad Commission v. Chicago, B. & Q. Ry. Co., 257 U. S. 563.

New York v. United States, 257 U. S. 591.

B. & O. Ry. v. I. C. C., 221 U. S. 612.

Southern Ry. Co. v. U. S., 222 U. S. 20.

Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1.

The first five of these cases deal with rates and the last three with labor relations, but the principle involved is the same. We shall deal at this point with the rate cases only, since the labor-relations cases will be adverted to further below.

The five rate cases may be divided into two groups,—the first three relate to intrastate rates as affecting interstate rates, while the last two cases deal with intrastate rates as part of the general economic problem of the maintenance of an adequate railway system. A brief discussion of this topic commences best with the consideration of the second and third cases cited above, the so-called *Minnesota Rate Cases* and *Shreveport Rate Cases*,—the two sets of cases together furnishing the best illustration of the principle under discussion. They furnish, in fact, a perfect-illustration of both,

the "reserve powers" of the States and of the limitation of those powers by the powers of the Federal Government.

The Minnesota Rate Cases (*Simpson v. Shepard, supra*) and the accompanying Missouri Rate Cases,

Knott v. Chicago, B. & Q. Ry. Co., 230 U. S. 474,

upheld certain state legislation, and the orders of state regulatory agencies, with respect to intrastate rates, against attack on the ground that the rates thus prescribed worked discrimination against interstate shippers of the carriers in question, whose business was that of carriers of both interstate and intrastate commerce. Those cases, involving some twenty odd railroads, had been elaborately argued, and were disposed of by this Court in very elaborate and careful opinions, delivered by the present Chief Justice on behalf of a unanimous court. But such is the power of the traditional antinomy "Here the States—here the Nation" over the legal mind, that a part at least of the profession completely misapprehended the import of those decisions. The grounds upon which those cases were decided do not concern us here, but it is of interest to note that the distinguished counsel for one of the railroads involved opened their argument with the statement: "The act to regulate commerce does not confer upon the Interstate Commerce jurisdiction or authority to regulate or control purely intrastate rates, and the order complained of is void for lack of jurisdiction"—citing the *Minnesota Rate Cases* and the *Missouri Rate Cases* as authority for this proposition. And another group of distinguished counsel, appearing for another railroad, opened their brief with the following statement:

"Since the appeal in this case was perfected, the cases of Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, and Missouri Rate Cases (*Knott v. Chicago, B. & Q. R. Co.*), 230 U. S. 474, have been submitted and decided by this court, and we submit that the decision of this court in these cases is decisive of the questions involved in the case at bar, and renders unnecessary the further citation of authorities."

But this Court upheld the orders of the Interstate Commerce Commission, in an opinion written by the same member of the Court, definitely establishing the power of the Interstate Commerce Commission over purely intrastate rates whenever they adversely affect interstate rates. Said the Court in this case:

"It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. *It is of the essence of this power that, where it exists, it dominates.* * * * *By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.* * * *

"Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (The Daniel Ball, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (Mobile County v. Kimball, 102 U. S. 691, 696, 697); "to foster, protect, control, and restrain" (Second Employers' Liability Cases [Mondou v. New York, N. H. & H. R. R. Co.], 223 U. S. 1, 47, 53, 54). * * * The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field. * * *

"In Baltimore & O. R. Co. v. Interstate Commerce Commission, supra, the argument against the validity of the hours of service act (March 4, 1907, chap. 2939,

34 Stat. at L. 14, 15, U. S. Comp. Stat. Supp. 1911, p. 1321) involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employees so that those who were engaged in interstate commerce should be confined to that commerce exclusively. Employees dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations. Again, in *Southern R. Co. v. United States*, 222 U. S. 20, 26, 27, 56 L. ed. 72, 74, 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, the question was presented whether the amendment to the safety appliance act (March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic, but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense by applying the requirements of the act to both classes of vehicles. So, in the *Second Employers' Liability Cases*, supra, it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all were engaged in interstate commerce, that power did not embrace instances where the negligent employee was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence, when operating injuriously upon an employee engaged in interstate commerce, had the same effect with respect to that commerce as if the negligent employee were also engaged therein. * * *

"While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle

that Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."

Houston, E. & W. T. R. Co. v. U. S., 234 U. S. 342, 350-353.

The principle was thus finally established that the power of the Federal Government to regulate commerce extends to the regulation of purely intrastate rates. But the dispute arose again when an attempt was made by the Federal Government to exercise that power not for the purpose of preventing discrimination but for the purpose of raising revenue for the railroads. That power was definitely established by the other two cases of the group cited above dealing with railroad rates.

Railroad Commission v. Chicago, B. & Q. Ry. Co., 257 U. S. 563.

New York v. United States, 257 U. S. 591.

But there is still another aspect of intrastate rates which should be considered here, because of its great significance in connection with the problems here under consideration. That is the situation dealt with in the first of that group of cases (*Railroad Commission v. Texas & P. Ry. Co.*). The significance of that case lies in the fact that, unlike the other rate cases, it was not a problem of the relation of intrastate rates to the interstate rates of the same carrier. In fact, in so far as the principle of the case was concerned, the carrier in question was not engaged in interstate commerce at all.

In that case, not only was the rate in question a purely intrastate rate, but it had no relation whatever to any interstate rate of the carrier involved or any other railroad carrier. Nor did the case involve any problem of revenue. The char-

acter of the railroad as an interstate carrier was therefore of no relevancy, if such was the case. From a purely "legal" point of view question the shipment was as purely an intrastate transaction as could possibly be imagined. And, as already stated, as far as the principle of the case is concerned, the carrier was a wholly intrastate carrier. Nevertheless, it was held that "at purely intrastate rate established by a wholly intrastate carrier was subject to the regulatory power of the Federal Government because of the intent of the shipper that after the termination of this particular shipment,—and of the contract under which it was shipped,—the commodity in question should become part of foreign commerce. *This intention and purpose* of the shipper, this Court held, was sufficient to make it a part of interstate commerce, and bring it within the regulatory power of the Federal Government, because the *economic effect* of the rate in question on foreign commerce did not depend on the technical-legal nature of the transaction, *but on its commercial nature.*

All of the arguments made by petitioners herein were urged upon this Court in that case; and, we respectfully submit, with much more reason. For in that case there was no *necessary* connection between the local transportation and the foreign commerce which it was supposed to effect. The local transportation could have been stopped without in any way affecting the foreign commerce. *The service itself was concededly local, and so was the contract under which it was rendered.* The following statement from the counsel for the appellants in that case correctly summarized the situation. Said he:

"The service rendered by the railway companies is wholly within the state. It has no contractual or necessary relation to foreign transportation. It is manifestly preliminary thereto, independently contracted for, not necessarily connected therewith. Locality therefore determines the jurisdiction, unless it is shown that though the local movement is actually within, it is legally outside the state."

And this Court decided that because its influence upon foreign commerce it was legally outside the State.

Railway Commission v. Texas & P. R. Co., 229 U. S.

In conclusion we desire to urge upon the Court, in considering the relation of the activities of the Consolidated Edison System to the commerce of the nation, in all its aspects, the principle applied by this Court in

Munn v. Illinois, 94 U. S. 113.

It is true that that case did not deal with the problem immediately here under consideration,—the division of power between state and nation. It did deal, however, with the analogous problem of the division of power between the individual and the state. And the general principle there laid down by this Court,—the principle which we invoke here,—is that matters which would otherwise be within the control of the individual pass into the “public domain” and become matters for state regulation when they acquire a “monopoly position” with respect to commerce. The “monopoly position” of Consolidated Edison with respect to the commerce of the nation, we respectfully submit, is far greater than that of the owners of the grain-elevators involved in the *Munn Case*. The Consolidated Edison does not merely stand “in the very gateway of commerce” with respect to interstate and foreign commerce, but it controls the entire nervous system of that commerce, which would be palsied by an interruption of the Consolidated’s activities. Clearly, its activities cannot be left to the regulation of any single member of the Union,—certainly that aspect of its activities which bears upon their *uninterrupted continuance*, must be controlled by the Federal Government in the interests of the entire nation.

POINT II.

The assumption by the National Labor Relations Board of jurisdiction in this case was in accordance with the decisions of this Court upholding the constitutionality and defining the scope of the National Labor Relations Act.

It is now settled by the recent adjudications of this Court that the question of the jurisdiction of the National Labor Relations Board must be determined not according to some formula dependent upon the nature of the business involved, but rather as the solution of the practical problem whether or not a stoppage of or interference with that business by industrial strife would injuriously affect interstate commerce. In the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation* this Court said:

"We have often said that interstate commerce itself is a practical conception. It is equally true that interference with that commerce must be appraised by a judgment that does not ignore actual experience."

This Court thus decisively rejected the notion which had theretofore prevailed in the legal profession that interstate commerce meant something that had a relation to transportation, and held that in so far as the regulation or supervision of the employer-employee relation is concerned Federal jurisdiction extends to everything that may interfere with or burden interstate commerce *even though the activity in which the employer and employees are engaged is in itself not interstate commerce*. As this Court has said in another portion of its opinion in the *Jones & Laughlin* case:

"The close and intimate effect which brings the subject within the reach of Federal power may be due to activities in relation to productive industry *although the industry when separately viewed is local*."

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 38.

And again, quoting from the first *Coronado* case:

"If Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint."

As a result of these decisions it is now settled that neither size, geographical location, nor the nature of the commerce or industry, is in itself decisive of the question of Federal jurisdiction, although all of these factors must be considered, and the decision must be based upon a consideration of all of them. It is with a view to these principles that we now turn to a consideration of the activities of the employer companies involved herein as disclosed by the Record.

A. The Magnitude of the Activities Involved and Their Relation to the Commerce of the Nation,

The companies involved herein form and are operated as one system. This system supplies practically all of the electricity and most of the gas used for light, heat and power in the City of New York and Westchester County. It also supplies, through the New York Steam Corporation, all of the steam power used in the City of New York by business concerns who do not own their own steam plants. The *magnitude* of its operations can be judged from the fact that its operating revenues in the year 1936 amounted to \$234,825,191.37, while the number of employees exceeded 40,000. The number of employees paid by the week alone amounted to 39,876 as of April 17, 1936. By far the largest branch of its business is the supply of electric current, the sales of which alone accounted for more than 75% of its operating revenues in 1936. The extent of its electric service can be judged from the fact that in December, 1936, it supplied about 2,324,800 individual consumers. The *nature and ramifications* of its business can be judged from an analysis of the business done by Consolidated Edison Company of New York, Inc., the principal electric service company of the system, in the year 1936, as given in the table printed on page 1346 of the Record (Stipulation, Board's Exhibit 2),

which shows the following uses of the electric energy sold by that company in that year: Residential, 12.13%; General Uses, including Commercial, 26.00%; Religious Purposes, 0.66%; Wholesale and Other Uses, 38.74%; Railroads, 10.61%; Municipal Street Lighting, 1.92%; Miscellaneous Governmental Uses, 9.94%.

The classification given above, which was furnished by the companies, conceals the real magnitude of the *business uses* of the electric current supplied, since most of it is hidden in the two categories labeled "General Uses" and "Wholesale and Other Uses." We can therefore only guess at it. The same is true of the business uses to which the supply of gas furnished by the System is put. On the other hand, the steam sold by the New York Steam Corporation, which amounted in the year 1926 to \$10,761,341.04, was used entirely for business purposes. The number of business concerns to whom this steam was supplied, who were dependent on this supply for the continuance of their operations, amounted at the end of that year to 3,050.

As some basis for a guess as to the amount of business (exclusive of governmental and railroad business) dependent on the electric service of the Consolidated Edison System, attention is called to the fact that according to the table already referred to, giving an analysis of the Consolidated Edison Co. of New York, Inc., which services New York City exclusively, the two categories of "General Uses" and "Wholesale and Other Uses" account for nearly 65% of all the electric energy sold by that company. Under the term "Wholesale" are included apartment houses, loft buildings, and industrial establishments. These comprise by far the largest single class of users. The next largest, that of "General Uses," which accounts for 26% of the consumption of electric energy in New York City, includes, in addition to commercial consumers, educational and charitable institutions, and hospitals. As the consumption of these institutions taken together cannot account for a very large proportion of the 26% grouped under "General Uses," it is apparent that by far the largest consumption in this classification must be by commercial consumers, of whom there were about 400,000.

The rubric "Miscellaneous Governmental Uses" includes the electric energy whereby the New York City Municipal Subway is operated. "Municipal Street Lighting" apparently includes, beside the lighting of the streets in New York City and Westchester municipalities, the highways and traffic signals in Westchester County, which light and regulate the automotive interstate traffic which passes through these highways, whether private or commercial. This brings us to the points of *direct* relation of the business of the Consolidated Edison System to interstate commerce. A long,—though by no means exhaustive,—list of governmental and private concerns directly engaged in Federal or interstate services is given under paragraph 67 of the Stipulation (R. 1375-1387). These include:

Federal Government agencies.

Western Union Telegraph Co.

Postal Telegraph Co.

Radio Corporation of America.

Columbia Broadcasting System.

New York Telephone Co.

Dow-Jones Tickers.

New York Stock Exchange.

Floyd Bennett Airfield.

Ferry slips on Hudson River from which ferries operate between New York and New Jersey.

Lighthouses and other aids to navigation in New York Harbor.

Railroad and steamship lines.

The last item requires a little further examination. We have already stated that the "System" supplies the electric energy for the operation of the Municipal Subway in New York City. It also supplies the electric power for the operation of the subway, elevated and street surface railroad lines of the Brooklyn-Manhattan Transit System. In addition, it supplies the electric power for the *Hudson and Manhattan Railway*, commonly known as the Hudson Tubes, running from New York City to points in New Jersey, and for the

Holland Tunnel, which constitutes one of the principal avenues for automotive traffic *between New York and New Jersey*. It also supplies the electric power for the lighting and operation of the Grand Central Station and yards which is the New York terminus of the New York Central, and N. Y., N. H. & H. Railroad lines, *and all of the power used in operating the electrified portions of these systems in New York State*. The New York Steam Corporation supplies the power used to operate the switches in the tunnel of the *Pennsylvania Railroad under the Hudson River*. The System also supplies electric current for a majority of the trans-Atlantic and coastal steamship companies having termini in New York City for lighting of piers, freight-handling, and related uses.

With these facts in mind it seems like a sheer waste of time to discuss at length the question of jurisdiction. Even under the narrowest possible definition of interstate commerce,—even if that were confined solely to interstate *transportation*,—there could be no doubt but that the business of the employers herein is such that its interruption would be an interference with and a serious burden upon interstate commerce. In this connection it must be remembered that the problem presented in this class of cases is never whether or not *the employer is engaged* in interstate commerce. That was the contention put forward and definitely rejected by this Court in the group of cases decided April 12, 1937. We have, therefore, in the statement of facts with reference to the activities of the companies involved herein deliberately left out some rather important facts relating to the purchase by them of materials in other States and transported to them in interstate commerce, and the sale by them of certain by-products in interstate commerce. As we view the law, these facts,—while important enough, and probably sufficient in themselves to give the National Labor Relations Board jurisdiction,—are relatively unimportant in this case. As we view the situation,—the combination of law and fact involved in this case,—the interference with and burden upon interstate commerce which would result from a labor dispute between the Consolidated Edison System and its employees

would be much greater from a cessation of any of its *services* than from a cessation of its business either by way of purchases of raw materials or sales of commodities. We therefore consider the technical nature of the *business* conducted by the companies a relatively subordinate matter, which dwindles into insignificance beside the really important question,—*the effect upon interstate commerce of a cessation of the services involved.*

Nor have the recent decisions of this Court introduced any new doctrine in this respect. As already pointed out in an earlier portion of this brief, the concept of interstate commerce varies in accordance with the problem in hand. It is not the same for the purpose of State *taxation*, on the one hand, and for the purpose of *regulation*, on the other. Nor is it the same for the purpose of *regulation* and for the purpose of "doing business." The doctrine established, or rather clarified, by the recent decisions of this Court, is, that, in considering the question of the power of the Federal Government to regulate interstate commerce,—upon which the problem of jurisdiction of the National Labor Relations Board depends,—the problem must be approached not only from the angle of the business under consideration as an *activity*, but also, and perhaps primarily, from the angle of the interference with *commerce generally* which would result from its cessation.

Another point made clear by the recent decisions of this Court, is that in considering these problems the nature of the activity itself is wholly immaterial, and the only thing to be considered is its *relation* to interstate commerce. As already pointed out, this is a familiar principle of rate-regulation. In view, however, of the persistent recurrence of the argument on petitioners' brief to the alleged "local character" of the activity or service involved, we shall quote another passage from the decision of this Court in the *Jones & Laughlin* case, the passage reading:

"The close and intimate effect which brings the subject within the reach of Federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This

has been abundantly illustrated in the application of the Federal Anti-Trust Act. In the Standard Oil Co. Case, 221 U. S. 1, and American Tobacco Co. Case, 221 U. S. 106, that statute was applied to combinations of employers engaged in productive industry. Counsel for the offending corporations strongly urged that the Sherman Act had no application because the acts complained of were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, but primarily affected manufacturing and not commerce. 221 U. S., pp. 5, 125. Counsel relied upon the decision in United States v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325, 15 S. Ct. 249. The Court stated their contention as follows:

"That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subject de hors the reach of its authority to regulate commerce by enabling that body to deal with mere questions of production of commodities within the States." And the Court summarily dismissed the contention in these words: "But all the structure upon which this argument proceeds is based upon the decision in United States v. E. C. Knight Co., supra. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice." (Citing cases.) 221 U. S., pp. 68, 69."

Tested by the test of its *effect upon interstate commerce*,—the only test decisive of the question at bar,—even the Jones & Laughlin Steel Corporation dwindles into insignificance when compared with the Consolidated Edison System. Serious, and even "catastrophic", though the closing of the business of the Jones & Laughlin Steel Corporation might be, the catastrophe of such a closing would be as nothing in comparison with the catastrophic consequences of the cessation of the business of the Consolidated Edison System. And the catastrophe would not *be avoided in the least* by the fact

that from a certain technical-legal point of view the business of the Consolidated Edison System might be termed "local". Nor by the fact that from another technical-legal point of view, or even technical-physical point of view, the electric companies "deliver" their electric current within the State of New York. Neither the legal cobwebs nor the imaginary physical lines could prevent the catastrophe which might ensue as the consequence of a dispute between the Consolidated Edison System and its employees! The legal cobwebs based on imaginary physical breaks have been brushed aside once and for all by the following language of this Court in its opinion in the *Jones & Laughlin* case:

"Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum."

Both the catastrophe which might result, and the legal vacuum in which we are asked to consider it, are magnified a thousand-fold in the case at bar. Large as it is, the Jones & Laughlin Steel Corporation is a pygmy compared with the Consolidated Edison System. But the question of size is relatively unimportant. More important by far is the nature of the activities in which the Consolidated Edison System is engaged,—*the nature of the services which would be interrupted* if a dispute between the Consolidated Edison System and its employees resulted in a strike. In speaking of the Jones & Laughlin works in Pittsburgh and Aliquippa, this Court said, quoting from the findings of the National Labor Relations Board, that they "might be likened to the heart of a self-contained, highly integrated body." That "body"

was the fourth largest steel producing concern in the United States. The steel industry is one of the most important in the United States. But it is, after all, only one of the industries of the United States. But New York City, which depends for its *light, heat and power* upon the uninterrupted operations of the Consolidated Edison System, may be likened to the brain or nerve center, if not of the entire *industrial system* of the nation, certainly of its entire *commercial system*. And it is *commerce*, rather than *industry*, that is the particular subject and concern of the constitutional provision under which the National Labor Relations Board operates. The commerce and industry of the nation would be seriously affected by the "closing" of the Jones & Laughlin Steel Corporation's operations. Yet neither *national industry* nor *national commerce* would come to an end, or be seriously "interfered" with,—although they would be greatly "burdened" in a legal sense. But it is difficult to imagine *national industry functioning properly, or interstate commerce going on at all*, except in a most disorderly and desultory fashion, if New York City were left without *light, heat or power* for its subways and elevated lines, and the elevators in its office buildings; with its post offices, telegraph offices, Stock Exchange, and all private offices, closed,—as they would have to be if the Consolidated Edison System ceased its operations.

**B. By Reason of the Nature of the Services Performed by It,
the Consolidated Edison System Is an Agency
of Interstate Commerce.**

The foregoing argument proceeded entirely from the point of view of the *magnitude* of the effect of the cessation or interruption of the operations of the Consolidated Edison System upon the commerce of the Nation. So far we have considered these activities as a whole, and irrespective of the services rendered to any particular portion of the nation's commerce, because we believe that those considerations are primary in a case like the present one, and should be given first consideration. Nevertheless, there are other aspects which must be taken into consideration,—aspects resulting

from the services rendered by the Consolidated Edison System to different parts or portions of the nation's commerce. We respectfully submit that when thus considered, the Consolidated Edison System is itself an *Agency* of interstate commerce, because its activities directly affect interstate commerce. These activities would therefore bring it within the purview of the National Labor Relations Act and the jurisdiction of the National Labor Relations Board even if they were not part of the giant system which we have just been contemplating. We are now addressing ourselves particularly to the activity of the Consolidated Edison System in furnishing the *motive-power* which sets in motion the trains of the New York Central Railroad and other interstate carriers, and the activities of the New York Stock Exchange, Western Union Telegraph Company, and the other important instrumentalities of interstate and foreign commerce, and of the governmental agencies enumerated above. These activities are of such a nature as to make the operations of the employers herein subject to the control of the Federal Government, quite irrespective of the other aspects of the case.

It is clear that the *motive-power* which sets in motion the through train between New York City and Chicago is as much an instrumentality of interstate commerce as the switch which turns on this power; and that the worker who produces this power and controls its continued flow is as much an integral part of interstate commerce as the man who turns on the switch which connects it with the train. Now, it is undisputed that the Federal Government has the power to control the employer-employee relations of the man who turns on the switch which starts this train on its course, and that power has been actually exercised by the Federal Government with the approval of this Court ever since the decision in the *Second Employers' Liability Case*. In fact, the principle involved has been established before that, even though the earlier exercises of the power in question may have been motivated not so much by a consideration of the welfare of the man at the switch as the safety of the traveling public and the efficiency of the instrumentality involved.

Baltimore & O. Railway Co. v. I. C. C., 221 U. S. 612.

Southern Ry. Co. v. U. S., 222 U. S. 20.

Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1.

But the same considerations apply in the case at bar. In legislation of this kind, consideration for the man involved and consideration for the commerce involved are really one and the same thing. As the opinions of this Court in the cases just cited show, the two are so inextricately blended that the one necessarily affects the other. Except, that, the objects and purposes of the National Labor Relations Act are more directly related to the protection of commerce and its efficiency than are the statutes involved in the earlier cases, for this last statute deals directly with the protection of interstate commerce against interruptions. Clearly, if the Federal Government has the power to legislate upon the rights of the switchman who turns on the switch at the Grand Central Station in New York City which sets in motion the instrumentality of interstate commerce, so as to protect him in case of injury, because such protection is considered necessary for the efficient operation of that instrumentality, the Federal Government must have the power to legislate so as to insure the continuance of the flow of the power which will make the operation of that switch possible. After all, both switch and switchman are there only for the purpose of providing the flow of this power.

POINT III.

The jurisdiction of the National Labor Relations Board does not *depend* upon the proportion of interstate to intrastate activity of the companies involved. Nor is it in any way affected by the New York State legislation on the subject.

A. The Jurisdiction of the National Labor Relations Board Does Not Depend upon the Proportion of Interstate to Intrastate Activities.

It is clear that in so far as the jurisdiction of the National Labor Relations Board is derived from the *relation* of the activities of the Consolidated Edison System as a whole to the commerce of the nation, and the effect which a cessation of those activities would have upon that commerce, there is no distinction between those portions of its business which supply the motive-power to the instrumentalities of interstate and foreign commerce on the one hand and the remainder of its activities on the other. The argument in that respect as contained under Subdivision A of the preceding Point applies to both alike,—both being subsumed under and covered by the principles laid down by this Court in the *Jones & Laughlin Case*. But even in the aspect of the case which was discussed under Subdivision B of the preceding Point, namely, if we consider only those activities of the Consolidated Edison System which make it an *Agency of Interstate Commerce*, the propriety of the exercise of Federal power would not depend upon the proportion which those activities bear to the remainder of the activities of the companies involved. In this respect there is a distinction between producers or distributors of *commodities* which are the subjects of commerce on the one hand, and *agencies* and *instrumentalities* of commerce on the other. In the case of commodities the proportion of interstate to intrastate commerce is important, even though not of decisive

importance. Even in the case of commodities, the *portion going into interstate commerce* may be so great as to seriously affect that commerce, in which event the *proportion* will be disregarded. For it is clear, that it is only that portion which goes into interstate commerce that exercises an effect upon it. In certain cases, however, the proportion may become important. That even then the business need not be *predominantly* interstate has been settled by this Court in the recent case of

Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 58 S. Ct. 656.

And it is equally clear that even in such a case the jurisdiction of the National Labor Relations Board could not possibly depend upon the proportion of the interstate portion of the business to the entire business. For, if that were so, a concern whose interstate business is large enough to be a matter of national concern would be withdrawn from Federal power by the mere increase of the intrastate portion of its business, even though its interstate business continued to be as large, or even grew larger in size, thus seriously affecting interstate commerce.

These considerations need not detain us, however, for they are clearly beside the point in cases which come within the domain of Federal power and Federal jurisdiction because of their *direct* effect upon interstate commerce. In such a case neither the size or magnitude of the activity itself, nor its *proportion* to any other activity of the business concern involved, is of any importance or relevancy. This is clear from an examination of the cases in this Court involving the power of the Interstate Commerce Commission to prescribe intrastate rates. In only one instance was the question of the proportion of interstate to intrastate business even considered, and that for a special reason which will be discussed further below. In none of the other cases was the proportion between interstate and intrastate busi-

ness considered of any relevancy. The exception referred to was the order of the I. C. C. involved in the case of

Railroad Commission v. Chicago, B. & Q. R. Co.,
257 U. S. 563,

in which this Court sustained the order of the Interstate Commerce Commission increasing all intrastate rates for the purpose of providing the carrier with a certain revenue under the provisions of the Transportation Act of February 28, 1920. Because of the specific nature of the order in question,—i. e., because the order was made not for the purpose of regulation, but for the purpose of raising revenue for the carrier,—it was necessary to show that the intrastate business was large enough to be important from a revenue point of view. But whenever the question was one of regulation of an interstate instrumentality or agency whose interstate and intrastate activities were commingled, the question of proportion was never even considered. The case of

N. Y. C. & H. R. Co. v. Hudson County, 227 U. S.
248,

is particularly significant in this connection. In that case the record disclosed that the amount of "railroad business", upon which the decision turned, was less than one-third of the entire business of the ferry involved,—the remainder being "local traffic" which was clearly not comprehended within the provisions of the statute there involved. Nevertheless, not even the counsel for Hudson County, which attempted to regulate the "local" traffic, considered that circumstance of sufficient importance to advert to it in argument. Needless to say, this Court did not mention it in its opinion overruling the contention. The reason is obvious: *The power of the General Government to regulate interstate commerce, including all its instrumentalities and agencies, cannot be defeated by commingling interstate activities with intrastate activities, or dissolving the one in the other, no matter how strong or how weak the resulting solution from an interstate commerce point of view.*

**B. The Jurisdiction of the National Labor Relations Board
Is Not in Any Way Affected by the New York State
Legislation on the Subject.**

The jurisdiction of the National Labor Relations Board was unaffected by any legislation of the State of New York for two reasons: *First, because there was no such legislation. And, second, because it couldnot be defeated by such legislation.*

(a) THERE WAS NO NEW YORK STATE LEGISLATION APPLICABLE TO THE CASE AT BAR.

As appears from the statement of facts, and the findings of the Board upon which it is based, the controversy herein between this respondent and the employers arose prior to May 5, 1937, the day upon which the respondent filed its Charge with the Board. The Complaint of the Board was filed on May 12, 1937. The hearings were concluded on June 24, 1937, except for certain special testimony which the petitioners were allowed to introduce on July 6, because the witness was abroad when the testimony was concluded on June 24. At the time the Charge and Complaint were filed there was no legislation on the part of the State of New York covering the kind of controversy involved herein. Subsequent to the filing of the Complaint, on May 20, 1937, the Legislature of the State of New York enacted a Labor Relations Act, substantially similar to the National Labor Relations Act. The State act went into effect on July 1, 1937.

The above bare statement of dates should suffice to show that there is no state legislation affecting the controversy involved in this suit. Clearly, a law passed on May 20, 1937, which did not take effect until July 1, 1937, could not possibly be applied to unfair labor practices which occurred prior to May 5, 1937, or at any time prior to July 1, 1937. And it is rather odd that counsel who are so alert in invoking constitutional provisions, as to invoke the "Impairment of Obligation of Contracts" clause of the Constitution, which clearly does not apply, should have overlooked the prohibition against *ex post facto* legislation, which might have ap-

plied if the New York Legislature had attempted to include within its purview unfair labor practices which occurred before the effective date of the Act. Had the New York Legislature attempted to do so, there is no doubt but that the astute counsel for the petitioners would have argued,—and with much more reason than any of the arguments contained in their present briefs,—that back pay in case of reinstatement for alleged unfair labor practice was in the nature of a penalty which comes under the ban of *ex post facto* provision of the Constitution, and therefore invalid. In fact, if we may judge by the present briefs, they would probably have argued that that made the entire order of the Board invalid, and the Act itself unconstitutional. However, we need not speculate on what *might have* happened, since the New York legislation clearly was not intended to, and does not, apply to anything that occurred prior to July 1, 1937.*

(b) NO STATE LEGISLATION COULD DEPRIVE THE FEDERAL GOVERNMENT OF ITS POWER IN THE PREMISES.

It is elementary that where national power exists, the national government cannot be deprived of that power by state legislation. No citation of authority is necessary. But if it were necessary it will be found in the cases already cited and in the excerpts from opinions of this Court already quoted. Nor does the fact of commingling of national matters with local matters, or the proportions of each in the resultant *ensemble* make the slightest difference, as already pointed out in an earlier portion of this brief. That would be the case even if the state had actually desired to retain

* As a matter of fact the constitutionality of the New York State Labor Relations Act is under attack in the New York courts for unconstitutionality on other grounds. By an odd coincidence, present counsel were served with a brief, while writing this portion of the brief, in which the Hon. Samuel Seabury, one of New York's most distinguished lawyers, makes a vigorous attack upon the constitutionality of the New York State Labor Relations Act. The argument is not material here, nor is the question whether or not that argument is likely to be sustained by the New York courts. But the fact of the argument, and the possibility of its being sustained, illustrates the utter absurdity of the contention of counsel for the petitioners herein that the passage of that Act has some bearing upon the question of the power of the Federal government here under consideration.

jurisdiction over its own "local affairs," so-called. As a matter of fact, however, that is not the case here, as will be seen further below.

C. The New York State Legislation Was Designed to Aid and Not to Hamper the Operations of the National Labor Relations Act, and the State Expressly Waived Its Rights in the Premises.

Traditionally, in all questions of disputed power between the Federal government and the State Governments, it was assumed that the State or States felt aggrieved by the assertion of Federal power. In a good many cases the assumption was utterly unjustified. But occasionally that was actually the case. One noted example is that of the case in this Court cited above of the increase of intrastate railroad rates under the Transportation Act of February 28, 1920. In the case of *New York v. United States*, 257 U. S. 591, the State of New York actually sued to enjoin the enforcement of the order of the Interstate Commerce Commission in question, claiming not only a lack of power on the part of the Federal Agency generally, but an invasion of its *contractual rights* with the New York Central Railroad. And the State of New York was joined in opposition to that assertion of power by the Federal Agency of every state in the union. Fortunately, we have no such situation here. The legislation here in question was passed by the State of New York in pursuance to a policy adopted by it in 1933, and joined in since by many other states, of aiding and assisting the National government in carrying out a policy of social legislation deemed beneficial to the country as a whole, and to intrastate commerce as well as interstate commerce. Because of the limitations upon the power of the Federal government, some real and some fancied, the State of New York, in common with other states, have recently pursued the policy of passing state legislation modeled upon Federal legislation, intended to apply to those fields of social and economic activity which the Federal government might not be able to reach. And, apparently, bearing in mind just the kind of argument that is made by counsel for the petitioners herein, it took the precaution, in this in-

stance, of *disclaiming* in advance its jurisdiction on the score of "local interest," and, in effect, *repudiating* any claim which may be made on its behalf based upon an alleged infringement of its sovereignty. In order to forestall, in so far as lay in its power, the kind of argument that is presented here, the Legislature of the State of New York inserted the following section as part of the Act in question:

"The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act." (N. Y. Consolidated Laws, Ch. 31, Art. 20, Sec. 715.)

It is not claimed here that this provision enlarges the power of the National Government or the jurisdiction of the National Labor Relations Board. That question is not involved here. But we do claim that the argument made by counsel for the petitioners on the score of the hospitals, schools, and other state and municipal institutions that may be involved, *as if that* made the State of New York anxious to retain jurisdiction over this controversy, is clearly unauthorized and beside the point. If anything, the State of New York, in pursuance of its public policy, as declared by this legislation, is anxious to withdraw from the field in every instance where that will permit the agencies of the Federal government to assume and exercise jurisdiction for the protection of the national interests, which must, of necessity, result to the benefit of the State as well as of the Nation.

Without entering upon the vexed problem whether or not jurisdiction can be conferred by consent, two things must be borne in mind in our connection: One is, that the existence of a power in the Federal government may depend upon the policy of a state as expressed in its legislation. And the other is, that the propriety of the exercise of an existing power may depend upon the action or attitude of

the State affected. While a state cannot have a public policy contrary to that of the nation,

Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1.

and no legislation on the part of a state can defeat a power granted by the Constitution to the Federal Government, a state may, as already pointed out, pass legislation in aid of a power existing in the Federal Government, and the Federal Government may pass legislation in aid of a state policy, as expressed in its legislation, covering or affecting matters not otherwise within the Federal jurisdiction.

United States v. Hill, 248 U. S. 420.

This is well illustrated in one of the cases cited and quoted from on the brief of counsel for the petitioners-employers, the case of—

Pennsylvania v. Williams, 294 U. S. 176.

Counsel for the petitioners seem to think that this case is an authority in favor of their position. It happens to be exactly the reverse. On the question of power that case holds that even in the case of a Building and Loan Association, which this Court has held in another case, also quoted on petitioners' brief, is a quasi public corporation,—i. e., a quasi-state agency,—

Hopkins Savings Assn. v. Cleary, 296 U. S. 315,

state legislation cannot possibly interfere with the power lodged by the Constitution in the Federal Government.

And, in addition, the *Williams* case illustrates the point contended for by us,—contrary to the whole tenor of the argument for petitioners,—that the question of power is not a rigid one; and that there is a difference between power exercised in aid of the other government concerned and power exercised in conflict therewith. This is particularly true of the exercise of power by the Federal Government, because of the *superiority* of its power. Because of that superiority of the federal power, the state must give way

in every case of concurrent jurisdiction. But that in itself should act as a restraint upon the exercise of power by the *Federal Agencies*, in the sense that any discretion lodged in them should not be exercised so as to arouse conflict with state authority whenever that can be avoided, and that due regard should be given in all such cases to the substantial interest of the state and its declared public policy. But, clearly, all of the considerations which actuated this Court in reversing the decision of the lower Federal Courts in the *Williams* case are considerations in favor of sustaining the decision of the Circuit Court of Appeals in the case at bar. Not only has the State of New York not attempted to take jurisdiction in this case, but it declared its public policy to be in favor of the taking of jurisdiction by the Federal Agency wherever possible.

PART TWO: THE EVIL AND THE REMEDY.

POINT IV.

The interference by petitioner-employers with the right of their employees to self-organization is conclusively and incontrovertibly established.

If the jurisdiction of the National Labor Relations Board is clear, the violation by the petitioner-employers of the rights of their employees is even clearer. We have in mind particularly the basic right of self-organization, as to which the facts are so clear and uncontroverted that they hardly leave any room for argument. A summary review of these facts, without going into any detail, will therefore suffice here, as in the pertinent facts of jurisdiction. But in order to fully appreciate the import of the facts to be reviewed, we may quote briefly the pertinent provisions of the National Labor Relations Act. Section 7 of the Act provides that—

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively *through representatives of their own choosing*, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

And Section 8 of the Act provides, among other things, that it shall be an “unfair labor practice” for an employer—

“(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

“(2) To *dominate* or interfere with the formation or administration of any labor organization or *contribute financial aid* or other support to it * * *

“(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to *encourage* or *discourage* membership in any labor organization.”

The purpose of the statute to leave employees absolutely free in the choice of their representatives who are to bargain collectively for them is clear and unequivocal, and the language in which any interference with that right is prohibited is as comprehensive as it could well be. This language was chosen with a view to making it impossible for any employer to *influence* the choice by his employees of the representatives who are to bargain with him, either positively or negatively,—*positively* by in any way assisting in or encouraging the choice of any particular agency which the employer may favor, or *negatively* by doing anything which would tend to prevent or discourage the selection of any agency which may have incurred the employer's disfavor.

We may also refer here to a few general principles which we believe to be applicable to the interpretation of the National Labor Relations Act. The first is, that the statute, being remedial in its nature, must be construed *liberally*—that is to say, liberally in favor of the employees for whose protection it was enacted. The second is, that in construing any part of the statute the entire statute must be considered, and each provision must be interpreted in the light of the aim and purpose of the Act as a whole. The third is, that, like similar statutes,—such, for instance, as the statute of frauds or the anti-trust laws,—its provisions must not be interpreted in accordance with any set of rules or formulae devised or formulated in advance, which would ossify or harden it, thereby depriving it of that fluidity or flexibility which is necessary if the statute is to effect its purpose, and furnish the protection which it was intended to give to the simple and the weak, against the overbearing of the strong and the wiles of the crafty. The terms “interfere”, “restrain”, and “coerce”, must therefore be given broad meaning, and the words “encourage” and “discourage” must not be limited by the words which immediately precede them. We respectfully submit, that under the provisions of this statute an employer has no right to do anything in the nature of the exercise of the *power* which he possesses over his employees by reason of the employer-employee relation, so as to encourage or discourage membership in any particular

labor organization. And we further respectfully submit, that under certain conditions *the mere expression of favor or disfavor by an employer amounts to interference or even coercion.*

Not that the answer to the question as to whether or not there was any violation by the petitioners-employers of the rights of their employees is at all dependent upon a determination of such subtleties. Indeed, the violation by the Consolidated companies of the rights of their employees guaranteed by the statute could not have been either more frank or more brutal. But in view of the vast and almost unlimited possibilities for evasion, we consider it important to call attention to the canons properly applicable to an interpretation of this statute; and we also desire to stress the fact that the violations of the statute which do not seem upon first glance to fall within its literal provisions are as important as the open and flagrant violations of its specific provisions. We have particularly in mind the "recognition" extended by the companies to the I.B.E.W. The statute says nothing about "recognition." Nevertheless, we respectfully submit, that the "recognition" involved herein, under the circumstances of this case, is as complete a violation,—nay, as open a defiance of the provisions of the statute,—as could well be imagined. The clear violations of the letter of the law which followed that "recognition" were already embraced in it; and their actual occurrence was merely an extension in time and space of the coercive power contained in the act of "recognition." This case, in fact, presents a conspiracy to violate the rights of the employees by foisting upon them representatives not of their own choosing. The gravamen of the offence is the conspiratory agreement known in the case as the "recognition"; and the open and flagrant violations of the provisions of the statute which followed it are the overt acts which carried the conspiracy into effect.

"*Coercion*" is the exercise of one man's will upon that of another through the compelling influence of the power which the coercer possesses over the one coerced; and "*interference*" is the prevention of the exercise of one's will by another through the power which the other possesses to direct

that will. Like the question of the effect of a certain economic situation, or group of facts, upon interstate commerce, or its interference with interstate commerce, the questions of coercion of or interference with employees under the National Labor Relations Act cannot be dealt with in an intellectual vacuum. They operate in a real world, and can only be understood in connection with that real world, which alone gives them meaning.

What was the real world in which and out of which this case arose?

The first fact to be considered is the existence of the Consolidated Edison System,—its size, its power.

The next fact to be considered is that during its entire history it has managed to keep all labor-unions from its preserves. *All attempts at labor union organization somehow petered out, and their organizers somehow found themselves outside of its breastworks.* The only labor union with which it came in contact, Local 3 of the I.B.E.W., recognized the inviolability of the System's rights not to have any labor-union among its employees, and *was under contract not to organize them.* Its absolute domination of its employees was free from any "interference" by labor-unions. Even the enactment of the National Industrial Recovery Act made no appreciable dent in its anti-union policy. As a matter of precaution it deemed it advisable to organize "unions" of its own, the so-called Employee Representation Plans, since conceded to have been company unions, although the term "company union" was never used by the companies until they were ready nominally to abolish them (R. 188-189).

The third fact to consider is the manner of the organization of these company unions. This illustrates perfectly the *norm* according to which the Consolidated Edison System permits its employees to "organize," and this *norm* acquires particular significance when we consider the manner in which the present so-called "labor organizations" among its employees, the "labor union"-petitioners, came into existence. A comparison of what happened at the time the Employee Representation Plans came into existence with what hap-

pened when the so-called I.B.E.W. "locals" were formed reveals the following significant points:

In the first place, the cause of the appearance of both "organizations" was an external one,—a law guaranteeing to workers the right of organization, *making a movement among the employees for real self-organization likely*. In the case of the organization of the Employee Representation Plans, it was the enactment of the National Industrial Recovery Act. In the case of the I.B.E.W. "locals," it was the National Labor Relations Act. Not the enactment of the law, but the decisions of this Court validating it. The significance of the occasion of the emergence of these organizations becomes striking when we consider the *manner* in which they came into existence.

The second, and most important point in this connection, is, therefore, *the will which created the organizations: In each instance the will was that of the master.*

When the National Industrial Recovery Act was enacted, the petitioners-employers were not satisfied to leave the problem of organization to their employees, but forestalled any possibility of self-organization by creating an organization into which any attempt of their employees to organize would be canalized. We need not consider at this point whether the canalization was to be by means of "gentle guidance" or coercion. Suffice it to say, that the moving force behind the organization process was the force of the *master's will or the master's pleasure*. Exactly the same thing happened when this Court declared the National Labor Relations Act constitutional: *Consolidated Edison System would not leave the matter of "self-organization" to its employees, but sought to forestall any real self-organization by providing the organization into which alone their employees were to be organized*. When the System decided to "disband" the Employee Representation Plans,—if we are to accept seriously its assertion to that effect,—it did not limit itself to making the bare announcement of such a decision. On the contrary, before the announcement of the abandonment of the Employee Representation Plans was made, the System had taken care to provide another organization into which its employees were to

be "guided" or *driven*. Before Mr. Carlisle addressed the "representatives" of his employees on April 20th, he had taken care to negotiate with Mr. Tracy for the new organization, and when he met these "representatives" he announced to them the "recognition" of the new organization in the same breath in which he announced the "abandonment" of the old. No *interregnum* was permitted. In effect, if not in actual words, what Mr. Carlisle announced to the "representatives" of his employees on April 20, 1937, was a paraphrase of the old formula of absolutism: "*The Company Union is dead. Long live the Company Union!*"

The third point to be considered is the character of the "representation" offered by the organizations provided by the Consolidated Edison System for its employees. It is only natural that the master's will that created the organizations should name the "representatives" who were to guide them. According to Straub's uncontradicted testimony as to the manner in which the Employee Representation Plans were organized, the company picked the men who were to do the organizing, and these men were then told that they "had been sent by the employees to start a means of collective bargaining." No such thing had in fact occurred,—Straub's fellow-employees had never delegated him either to negotiate with Management or to start any organization among them. A formula of words was adopted by the Master in order to comply with what he thought were the requirements of the law as it then stood. Exactly the same procedure was followed in the organization of the I.B.E.W. "locals." Except that in this case the manner was more brutal and more brazen,—owing to the "necessity" of the case. "Necessity knows no law." Nor has it, apparently, any decent regard for public opinion. When Mr. Carlisle met the "representatives" of his employees on April 20, 1937, to announce to them the "recognition" of the I.B.E.W., the personnel of the "representatives" who were to represent the employees in the re-labeled company unions had already been settled between Mr. Carlisle and Mr. Tracy,—settled by an agreement to continue the same set of "representatives" that had been functioning in what is now admitted to have been a company union.

The Record shows that it was part of the arrangement entered into before the chartering of the so-called "locals" of the I.B.E.W., that the officers of the company unions were to continue to function as the "representatives" of the employees after the "re-organization" of the "Plans" into "Locals" (Board's Ex. 15, Record, p. 1406).

There is only one particular in which the manner of the creation of the presently functioning "labor organizations" among the Consolidated Edison employees differs from that in which their predecessors, the avowed company unions, were created: The Employee Representation Plans were apparently organized in a leisurely manner; while a rather unusual, not to say extraordinary, haste was exhibited in the creation of the "Locals". The reason for this haste was two-fold: Section 7-A of the National Industrial Recovery Act was at best a slow-moving thing, and the employers could afford to take their time. But more important than that was the fact that there was no actual movement for self-organization among the Consolidated employees at that time; whereas in April, 1937, this Interceptor, an affiliate of the energetic C.I.O., was actually in the field organizing the System's employees. Haste,—unseemly haste,—was therefore imperative; and the System was fully up to the occasion. For years there had been no organization of any kind among its employees,—all organization being frowned upon by the Master. When the first groping steps were taken by law to protect the rights of workers to self-organization, the System proceeded at a leisurely pace to defeat the provisions of that law by providing a lifeless, spineless, and functionless, organization. The situation was different in April, 1937. The National Labor Relations Act is a law with teeth in it,—even though the teeth may not be as effective in some respects as might be desired. And the C.I.O. was in the field, doing a remarkable organization job. Not only haste but extraordinary pressure was therefore required,—and the System has accomplished the remarkable feat of organizing a great majority of its employees in the space of two months.

This in itself is sufficient evidence of the fact that the work or "organization" was done not by the inert,—not to say lifeless,—I.B.E.W., but by the Consolidated Edison System.

But we need not speculate on the subject. The Record is replete with evidence of the "organizational" work of the System,—both as to the facilities furnished to the I.B.E.W. and the coercion of its employees. The testimony with respect to the latter, naturally, came only from the employees themselves, who felt themselves coerced. But the testimony as to the facilities furnished by the companies to the I.B.E.W. came not only from the witnesses called on behalf of the complaining union, but also from Mr. Floyd L. Carlisle himself. For, notwithstanding the formal denials entered by him as to *knowledge* of these facilities, he was forced to admit what could not be denied,—namely, that the "disestablishment" of the ERP, which in reality was the transformation of these Plans into the so-called "Locals" of the I.B.E.W., lasted for quite a while, after formal "recognition" had been granted to the I.B.E.W. But quite apart from the question of facilities and financial help furnished in the form of I.B.E.W. "organizers" who were carried on the payrolls of the companies, the "recognition" itself was the greatest organizer that could possibly have been employed on behalf of the I.B.E.W. In this connection, certain portions of Mr. Carlisle's testimony become extremely significant, particularly when taken in connection with the previous history of the companies and their relations to the I.B.E.W.

We have already referred to the fact that the Consolidated Edison Company had an agreement with the I.B.E.W. as far back as 1924, whereby the latter *agreed not to organize* the Consolidated Edison employees. Mr. Carlisle also testified that, after the NRA came into existence, the I.B.E.W., through Mr. Bonguiazet, its secretary, had made repeated attempts to enter into contractual relations with the Consolidated Edison System but met with no success (R. 1216). It also appears in the Record that when an independent organization known as the International Brotherhood of Utility Employees was formed after the National Industrial

Recovery Act became a law, and thereupon affiliated with the I.B.E.W., it met with such determined opposition from the companies, and received so little encouragement from the I.B.E.W., that it withdrew from the latter organization (R. 415-416). With these facts in mind, let us now turn to Mr. Carlisle's own testimony as to the causes of the rapid "organization" of petitioners' employees by the I.B.E.W. and the motive power behind it,—bearing in mind the additional facts of Mr. Carlisle's personality and his interest in denying that the companies in any way brought about this "organization."

We start with the fact, conceded by Mr. Carlisle, that there was no organization of the I.B.E.W. among the employees of the Consolidated Edison System on April 20, 1937, when "recognition" was extended, *the recognition which Mr. Carlisle himself considered equivalent to the making of a "collective bargaining agreement."* Mr. Carlisle testified that he did not know at the time what, if any, membership the I.B.E.W. had among the Consolidated employees, and from other portions of the Record it is clear that it had none. The letter of "recognition," which is dated April 20, 1937, and is in evidence as the Board's Exhibit 13-A, was sent, according to Mr. Carlisle; after two conferences which he had had with Mr. Daniel W. Tracy, the president of the I.B.E.W. Both of these conferences took place *after* April 12, 1937, and *before* April 19, 1937. According to Mr. Carlisle's testimony, the general terms of the "contract" to be entered into between the Consolidated and the I.B.E.W. were agreed upon at the first conference, and all of the details were agreed upon at the second conference,—with the single exception of that of an increase in wages (R. 1221). The latter question was left open, according to Mr. Carlisle, for consideration by committees which were to be brought into existence. And it was only after the interview between Messrs. Carlisle and Tracy at which the general terms of the "contract" had been arrived at, *that the I.B.E.W. put any organizers into the field* (R. 1222). But more important even than the question of the time when the I.B.E.W. started its organization work, is the cause of that activity on the

part of the I.B.E.W., as understood by Mr. Carlisle himself. On this point he testified:

"We having entered into a collective bargaining agreement, presumably organization work, would proceed" (R. 1223).

That the organizational drive could not have succeeded,—*nay, would not have been undertaken*,—without this previous agreement with the employers is amply proven by the Record. The Record also shows that when this organizational "drive" on behalf of the I.B.E.W.,—really the dragooning of the employees into the I.B.E.W.,—was going on, no other labor organization could even get from Mr. Carlisle the courtesy of an answer to a letter, *even though that organization admittedly represented some of the companies' employees*" (R. 1241).

POINT V.

Collective Bargaining a La Carlisle.

Under the preceding Point we have discussed the System's notion of "employee representation" and "self-organization" by employees. We may now turn to examine its notion of "collective bargaining", and how it squares with the right of the same name guaranteed by the National Labor Relations Act. It goes without saying, of course, that if there was no real *self-organization* on the part of the employees, there could not have been any real collective bargaining. Clearly, bargaining by an employer with "employee representatives" chosen by himself, or whose selection was influenced by him and was not really the free act of the employees, is not collective bargaining within the meaning of the law.

Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 547.

But the vice of the alleged collective bargaining involved in this case goes much deeper than that. Apparently Mr.

Carlisle was not satisfied with picking the "representatives" of his employees with whom he was to "bargain." In order to make assurance doubly sure, he limited the scope of the "bargaining" to such an extent that it amounted to no bargaining at all. The Record shows, and the Board has found as a fact, that, while the ERPs were formally in existence, ~~they were not permitted to have any say with respect to wages,~~—the only thing that the ERPs could possibly have bargained about, since there was no question of striking or similar matters. With the change of the law, and, therefore, of the form of organization, it became necessary to give the alleged "labor organization" some bargaining function,—at least *formally*, so as to bring them "within the law," as it was hoped astute counsel might induce the courts to interpret it. This matter of "within the law" is very characteristic of Mr. Carlisle's entire conduct. Although he pretended to be desirous of acting in accordance with the "spirit" of the law, his own testimony shows that his real desire was to bring himself "within the law" in the sense of not being caught while transgressing it. This was, of course, a rather difficult task under the National Labor Relations Act and the decisions of this Court upholding it. But Mr. Carlisle was equal to the occasion,—at least, so he thought. The device attempted this time to circumvent the law was a simple one: Having decided upon the reorganization of the company unions by placing upon them the label "I.B.E.W. Local" instead of the label "Employee Representation Plan," he proceeded to limit their functions in a manner that would leave them practically functionless,—so that the new organizations would not only be the same in personnel as to "representation", but also in their functionlessness. The plan called for the substitution of "Locals" for the "Plans", with the same managing personnel. But the new "Locals" were to have no more say in the actual "collective bargaining" than the Plans had. Mr. Carlisle did not wait until the "Locals" were organized before he did his "collective bargaining". The times were dangerous, and Mr. Carlisle was taking no chances. The C.I.O. was in the offing, and there was no telling but some Straub or other might upset the apple-cart, if the actual collective bargaining were left even

to the so-called I.B.E.W. "locals" when actually formed. And so Mr. Carlisle did his collective bargaining in advance of the organization of the I.B.E.W. "Locals," even though these "Locals" were supposed to be "the party of the other part" to the bargain. The "collective bargaining" agreement, which was to be entered into by the "Locals" when organized, was actually made before the ERPS, which they were to supplant, had been dissolved.

The first intimation that the ERPs had that they were to dissolve was on April 20, 1937. — At that time, concededly, there was no "local" of the I.B.E.W. among the Consolidated employees. But the "contracts," which are in evidence as Respondents' Exhibits 17-22, purporting to be agreements between the respective companies of the System and certain locals of the I.B.E.W., were actually made prior to April 19, 1937, before those "Locals" had been organized. According to Mr. Carlisle, everything had been agreed upon at the two conferences which he had had with Mr. Tracy before April 19, 1937, except the detail as to the raise in wages. We need not go into the question whether or not that detail had actually been agreed upon; and if not agreed upon, whether it was not one of those things which Mr. Carlisle had deliberately left open in order to bring himself "within the law." Suffice it to say, that according to Mr. Carlisle's own testimony, the question of wages was not of particular importance at this juncture, in view of the purposes sought to be accomplished,—namely, the shutting out of the C.I.O. As to what Mr. Carlisle really considered important in the contract to be entered into was stated by him as follows, in giving an account of his first interview with Mr. Tracy:

- "Mr. Tracy had requested it, he stated that with the Wagner Labor decision he hoped that the company now would give consideration to a contract with a National organization. I spent several hours discussing the type and nature of an agreement. I stated that the operations of the Public Utility, Electric and Gas and Steam in a city like New York, that any agreement would have to be on the basis of no strikes, no sit-downs, no interruption of operations, and machinery for complete arbitration and settlement of grievances." (R. 1220)

Mr. Tracy, having accepted the basic terms of the agreement at this first conference, there was very little left to agree upon except certain details, and these were agreed upon at the next conference, without the assistance of either "Plans" or "Locals". Mr. Carlisle's testimony on this point is as follows:

"Q. Now, that then was the first conference, and when was the next conference before the 19th or 20th of April? A. I don't recollect whether it was one or two days before, it was very close to it.

"Q. One or two days before the 19th or 20th? A. Yes.

"Q. And was that too with Mr. Tracy alone? A. Well, I am not sure whether Mr. Low might have been present.

"Q. Who is Mr. Low? A. Mr. Low is the executive vice-president of the Brooklyn Edison Company.

Q. And what was the purpose of that conference with Mr. Tracy? A. That was to further go into the details of clauses that would be inserted in a contract.

"Q. And at either one of those conferences was there any discussion of membership? A. Of what?

"Q. Of the I.B.E.W. in your system? A. No.

"Q. Have you agreed at either one of those conferences that a contract would be executed? A. No, the understanding was that we would enter into collective bargaining with them on the basis other than wages that we had discussed. *The question of wages would be taken up with committees of men. That presumed that those committees would come into existence.*"
(R. 1221-1222)

We need not imagine, however, that the question of wages was actually taken up by committees selected by the employees. Oh, no! A reading of the Record leaves no doubt of the fact that no one but the few picked men,—picked by Mr. Carlisle from among the chief officers of the ERPs,—had anything to do with the "contracts" as finally signed and attested,—and that even these men had nothing to do but to sign on the dotted line.

So much for the "collective bargaining". And now as to the persons who were to be bound by it. The "contracts" in

question pretend to be limited in scope to employees who are members of the I.B.E.W. But Mr. Carlisle specifically stated that his interpretation of these agreements is that they cover all of Consolidated's employees,—irrespective of what organization they belong to. Except that employees who do not belong to the I.B.E.W. have the right to bring grievances as individuals. And Mr. Carlisle specifically testified that the part of the agreement which made the I.B.E.W. the exclusive collective bargaining agency for all employees, went into effect on April 20, 1937, notwithstanding the fact that at that time the I.B.E.W. represented none of the employees.

According to Mr. Carlisle, that made no difference. Such was the peculiar interpretation of the right of collective bargaining which counsel for petitioners now ask this Court to sustain. In answer to a question as to the basis upon which recognition was granted, Mr. Carlisle said:

"Oh, no. When we wrote the letter to Mr. Tracy that we would engage in collective bargaining, there was no stipulation that they had to have any number of members." (R. 1236)

And in answer to an inquiry on the subject of his knowledge as to the extent of the membership of the I.B.E.W. among his employees at the time of the signing of the formal contracts, Mr. Carlisle said:

"I don't recollect that we had received any formal statement; but Mr. Tracy had stated that there were so many members in this company and that company and the other company, and I assumed that that was none of our business." (R. 1237)

And a little later he testified that the number of employees represented by the I.B.E.W. "was not a controlling reason in the entering into the collective bargaining arrangements" (R. 1238). But he was emphatic on the subject that the "recognition" by the companies of the I.B.E.W. on April 20, 1937, settled the question of "collective bargaining" for all of their employees, and that the "contracts" signed actually covered all of the employees as far as group or "collective"

bargaining was concerned. On the first point his testimony was as follows:

"Q. Was it then that you discussed this matter and held upon the question of the execution of the contract until such time as Mr. Tracy did more organizational work, in your system? A. Oh, no, no, the letter of April 20th was the action of the company to recognize the International Brotherhood as the collective bargaining agency." (R. 1222).

And on the second point he testified:

"My understanding is very definite and clear so far as the collective bargaining agreement is concerned. It is executed with the I.B.E.W. Now, grievances that arise with members of the I.B.E.W. are presented under the terms of this contract. If there is an employee who is not a member of the I.B.E.W. and he has some grievance that he wishes to discuss with the management we will discuss it with him but it is related to his individual affairs and not in connection with any other organization that he may be a member of.

"Q. So that the company in the contract permits the employees to take grievances up with management?

A. As individuals.

"Q. As individuals? A. Yes.

"Q. May they take grievances up with management as members of a different labor organizations? A. No." (R. 1234),

And again:

"Q. Yes. Well, you do say, however, that employees cannot be represented by other labor organizations in the submission of grievances. Now, do you also say that other employees cannot be represented, if they so desire, by a different labor organization? A. Why, we have nothing in this contract that prohibits a man from joining any labor organization or not, as he wants. However, as I understand collective bargaining, as I understand the law of the state under which we are operating, this is our collective bargaining contract, and no other.

"Q. I see. A. But an individual can't present any grievance that he pleases.

"Q. Yes. And that, despite the fact that the contract only speaks for employees who belong to a labor organization and not for a majority of the employees?"

A. We have entered into what I regard as a *completely, all-embracing, collective bargaining arrangement, and this is the only one that we concentrate (sic).*" (R. 1235).

POINT VI.

The discriminatory discharges and employment of labor spies were clearly established.

It would be tedious, if not quite impossible, to rehearse here in detail the testimony on the question of discriminatory discharges. The testimony on these points occupies several hundred pages of the Record, and the summary given in the Findings of the Board occupies about twenty pages of the *Decision*. This summary, which will be found at pages 106-125 of the Record,—is full as well as convincing. It would be profitless to attempt another summary, and those who may not be convinced by the summary given by the Board would, of necessity have to read the entire Record. One thing is clear, however, and that is that the Findings of the Board are *supported by the evidence*, within the meaning of Section 10(e) of the National Labor Relations Act, which provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive."

In this connection we must remember that the facts are not really in dispute, and that the most that can be claimed by counsel for the employers is that what appear to be damning facts on the surface were ordinary acts actuated by motives of economy, and that the damage done to the attempts of their employees to self-organization by those discharges was the result of the long arm of coincidence. It is extremely doubtful whether any tribunal could possibly be made to believe, for instance, that the simultaneous discharge of Wersing, Wagner and Greulich, which removed at one fell blow all of the officers of Local 103 of the Independent

Brotherhood, was the result of mere coincidence. However, this is not the question before this Court. The question is, whether the National Labor Relations Board was bound to accept that explanation, which to it seemed utterly unbelievable.

The same is true, of course, with respect to the charge of employment of labor spies, made by the present Intervenor and sustained by the Board: The question is not whether the Board could have accepted the employers' "explanation", but whether it was bound to do so. And, of course, the Board was not bound to do so either in reason or under the law. In this connection, as well as in the case of the discharges, the attention of the Court is respectfully called to the fact that the employers, and the witnesses called to testify in support of their contention on these points, did not hesitate to make statements which were clearly false, as is shown by the following findings of the Board with respect to the employment of labor spies,—which, incidentally, conclusively prove the utter lack of *bona fides* in the contentions with respect to the discharges.

"The complaint alleges that the respondents had employed and were employing industrial spies or undercover operatives for the purpose of disclosing to them the activities of their employees in and on behalf of labor organizations. The respondents admitted the employment of detectives, but denied that it was for the purpose of investigating the union activities of their employees. The respondents asserted that in any event the employment of detectives did not extend beyond November 1936 and that consequently the controversy on this issue has become moot.

"Uncontroverted evidence discloses that the respondents engaged the detective services of Railway Audit and Inspection Company, herein called the Inspection Company, from October 1933 through October 1936. The manager of the New York office of the Inspection Company testified that the services rendered to the respondents included investigation of the union activities of the respondents' employees. Frequently the respondents would send circulars, leaflets, and other literature to the Inspection Company for investigation

by its detectives. Among the various types of literature of this character were included the circulars and leaflets of the Independent Brotherhood, some of which contained the names of the leaders of that organization. Detectives of the Inspection Company also covered several of the meetings and conventions of the Independent Brotherhood throughout the year 1935. The Inspection Company made reports of its investigations and delivered them to the respondents.

"The manager of the Inspection Company and one of the detectives who did the investigating testified that detectives trailed Stephen L. Solosy, named in the complaint, and Philemon Ewing, both organizers for the Independent Brotherhood in Manhattan, in April 1935. The detective who trailed Solosy was given a picture of him and told to trail him, which he did for two days, after which time he was replaced by another detective whose report was delivered to the respondents. Solosy was unaware that he was being shadowed, but Ewing was exasperated by the ineptitude of the detective who trailed him and finally turned around and entreated him to perform his duties with more adroitness. Both Solosy and Ewing were discharged on January 17, 1936, and as we find below, one of the factors leading to Solosy's discharge was the report of his activities made by the Inspection Company. The respondents apparently still have in their possession the reports of the Investigation Company and so have the power to utilize them as a basis for future discriminatory action against their employees."

POINT VII.

This was not a jurisdictional dispute between labor unions, nor was the problem of representation as between bona fide labor unions in any way involved.

An attempt is made by counsel for the petitioners to present to this Court a supposed conflict between two labor unions, each claiming jurisdiction, or, rather, the right to represent the employees involved herein for the purpose of

collective bargaining. This issue is wholly fictitious, and does not arise on the record. In so far as this case at all involves two labor unions, the issue between them has been injected by the I.B.E.W. and its so-called "locals" by their intervention in the United States Circuit Court of Appeals after the true issues in this proceeding had been tried and disposed of by the Board. The record shows that the I.B.E.W. had notice of the proceedings, and that its counsel and representatives were actually present at some of the hearings. The failure of the I.B.E.W. or of any of its "locals" to come into the proceeding any earlier, as they could have, was no mere accident. It was part of a carefully calculated plan to obscure the issues in this case,—one of the issues being the existence of the so-called "locals" of the I.B.E.W. as independent labor unions. Their existence as such is denied by the respondents, and their wholly fictitious character as *bona fide* labor unions is established by the findings of the Board.

An attempt is made to destroy the decisive effect of this finding of the Board by a reference to the dismissal by the Board of the charge under Sec. 8(2) of the Act. But that dismissal neither destroys nor in any way detracts from the finding of the Board that the so-called "local unions" are mere continuations of the organizations formerly known as ERPs and designed to carry out the purposes for which the "Plans" had been created, namely, to frustrate self-organization among the employees involved. In this connection we again respectfully call the attention of the Court to the situation as it stood by the pleadings and issues made before the Board, the evidence before it, and the legal significance of those facts under the National Labor Relations Act. Section 8(2) of the Act makes it an "unfair labor practice"—

"To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

The only labor organization against whom the Charge made by the present respondent ran, and the only one mentioned in the Complaint of the Board, and the only one defi-

nately mentioned throughout the evidence as doing anything, was the I.B.E.W. But we do not claim that the I.B.E.W. as such is not a bona fide labor union, or that it is dominated or controlled by the employers herein. Nor was there any evidence of any financial support given to the I.B.E.W., as distinguished from the so-called "locals" which are in reality neither unions nor a part of the I.B.E.W. as far as control is concerned. It is true that the evidence showed some kind of connection between the two organizations,—or, rather, that a Mr. Tracy, who happens to be the President of I. B.E.W., was one of the instruments used by the employers in the creation of the alleged "locals." But that was insufficient to make a finding against the I.B.E.W. *as such*. In this connection the attention of the Court is respectfully called to the fact that the dismissal of the Charge under Sec. 8(2) was *without prejudice*. Apparently, the Board considered that the *situation may be such that will warrant* a finding against I.B.E.W., but that the *evidence* had not fully disclosed that situation. In a spirit of conservatism it dismissed this Charge on the evidence presented, but without prejudice to its renewal in a different proceeding when proper evidence may be submitted of the exact relationship of the two organizations. But that does not in the slightest detract from the evidence or finding that the so-called "locals" themselves were the creatures of the employers.

This becomes even more apparent when we consider the actual decision of the Board as embodied in its order. That order is completely silent with respect to the so-called "local unions." The *writ* of the Board does not run against them. Their existence is completely ignored. We need not discuss the question as to whether the Board could not, on the basis of the evidence contained in the record, and summarized in the Findings, have ordered their disestablishment. Pursuing its *ultra-conservative* course, the Board saw fit not to make any order calling for the disestablishment of these organizations, because there was no evidence of any action on their part, nor any attempt on their part to claim any rights by intervening in the proceeding. The only tangible thing that was in the record when the case was finally closed, were the

alleged "contracts" between these vague and elusive entities and the very concrete and tangible employers, *who were the only ones before the Court offering these contracts in evidence and claiming rights thereunder*. No one else appeared to claim any rights under these alleged "contracts," and the Board felt no call to pass upon either the independent existence or the supposed rights of these nebulous beings. But it left no doubt as to what it thought of their parentage and the mode of their creation. Nor what it thought of their "contracts" or "contractual rights." They themselves were not before the Board. But the "contracts" supposed to have been entered into by them was put into evidence by the employers, *and the employers were claiming rights thereunder*. The Board passed upon the issue thus presented, finding that these contracts were not entered into in good faith, were a mere device and scheme to defeat the rights of the employees to self-organization, and ordered its disestablishment. The finding of fact is supported by the overwhelming evidence, both oral and documentary; and the order follows that finding as day follows night.

POINT VIII.

Neither the "due process" clause, nor the "impairment of obligations" clause, nor any private contractual rights are in any way involved.

The argument under the preceding Point was made *as if* a contract in the ordinary sense were involved. But we are not dealing with any such contract. In fact, the use of the word "contract" is wholly misleading, and puts in a false light the order under review. Before, however, examining the nature of this "contract" and the kind of "rights" which may arise thereunder, and *to whom* they may accrue, we must refer to a few subordinate matters made much of in one of the briefs for the petitioners.

A. The Alleged Impairment of Obligations of Contracts.

Among the clauses of the constitution appealed to, are the "impairment of obligations of contracts" clause and the "due process" clause. That the "impairment" clause does not apply is too evident to require extended argument. Indeed, the claim hardly merits any argument at all. It is elementary that that clause is not a limitation on the powers of the Federal Government. And it is equally elementary that it applies only to rights accrued under existing contracts, and does not prevent any legislation on the part of the governments limited thereby with respect to the mode of making future contracts or the kinds of contracts that may be made. Also, that it applies only to the acts of the legislature.

Sinking Fund Cases, 99 U. S. 700.

Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527.

Ogden v. Saunders, 12 Wheat. 213.

Missouri & M. R. Co. v. Rock, 71 U. S. 177.

Knorr v. Exchange Bank, 79 U. S. 379.

New Orleans W. Co. v. Louisiana S. R. Co., 425 U. S. 18.

B. There Was No Violation of Due Process.

Nor is there much more to the argument of the "labor union" petitioners based on the due process clause, in so far as it relates to the procedure followed by the National Labor Relations Board. We do not intend to argue here the questions with respect to the general character of the procedure established by the National Labor Relations Board. We believe that the argument from the *Morgan* case is wholly inapplicable to the procedure followed in this case,—or that generally followed by the National Labor Relations Board,—but we prefer to leave it to the able counsel for the National Labor Relations Board to present the argument on that branch of the case. We shall therefore limit ourselves entirely to the argument presented by the "labor union" petitioners based on the alleged failure of the Board to give them proper notice, and the supposed disposal of their alleged rights *in absentia*.

Briefly stated, their argument is that they had not been properly "summoned" and that, therefore, the character of the "contracts" involved could not be passed upon by the Board. That this argument is without merit has been established by repeated adjudications of this Court under both the Fifth and the Fourteenth Amendments. These adjudications are to the effect that no particular form of notice is required, but that the form of notice depends on the nature of the case. It is clear that a proceeding under the National Labor Relations Act, like those before many other administrative governmental agencies of a semi-judicial character, is in the nature of a proceeding *in rem*. What is required is reasonable notice, either to the public at large or to particular groups specially interested, that such a proceeding would be had or hearing held, and an opportunity to be heard to those *desiring* to be heard. In this connection it must be remembered that the Board has no jurisdiction over any labor union. It cannot *summon* a labor union, nor *order* it to do anything. The only persons subject to its *summons* and *order* are employers. But the authors of the Act knew, of course, that other persons might have interests which might be *affected* by such orders. The Act therefore provides that any person interested may seek intervention voluntarily, and that any person whose interest might be adversely affected by any order of the Board might intervene in the Circuit Court of Appeals.

Clearly, a person who chooses to stay away from the hearings of the Board, cannot complain that he had not been heard by the Board. And a person who seeks to intervene only when the proceeding comes into the Circuit Court of Appeals, and then does not ask for any further hearing, cannot complain that his rights had been adjudicated without his presence or opportunity to be heard. Such a person has voluntarily, and as a matter of choice, invited someone else to make the record in his case, and he must abide thereby. This is precisely the situation of the labor union petitioners herein. They not only had knowledge of the proceedings but were actually present at some of the hearings. But they pre-

ferred not to participate in the proceedings. They left it to the employers,—who, concededly, are joined in interest with them,—to make the record in this case. They cannot now complain that they had not been heard. It would be odd, indeed, if in a proceeding like the present one, which is intended to be non-technical and expeditious, a person could deliberately stay away from the forum wherein the matter is tried, so that he could not be cross-examined on the origin, genuineness and merits of his alleged rights, and then intervene on appeal to raise the complaint that the judgment should be reversed because he had not been heard. The game played by the "labor union" petitioners is too transparent, and quite on a par with the alleged rights, which they are seeking to assert.*

That the due process clause is not intended to perpetuate or sanctify a particular mode of procedure is too well settled to require any extended citation of authority or elaborate argument.

Hurtado v. California, 110 U. S. 516.

Maxwell v. Dow, 176 U. S. 580.

Hawaii v. Mankichi, 190 U. S. 197.

* Counsel for the "labor union" petitioners state on their brief,—after making the point of the separate existence of the so-called "locals" from the I.B.E.W. as such,—that the separate existence and address of the "locals" were known to respondents but no attempt made to give them separate notice. That the "locals" had separate existence from the I.B.E.W. with respect to property and "property rights" is undoubted. But it does not at all follow that they could not be treated as one with respect to notice,—since notice does not depend on technical separate existence but on the likelihood that the information would be passed on. More important, however, is the circumstance that the record does not bear out the statement of fact. The reference in the brief to the testimony of the witness Straub, who testified that on May 11th or 12th he was aware of the existence of one of the locals and that it had an office of its own. (It will be recalled that the Charge was filed May 5, and the Complaint May 12.) But at that time Straub was an officer of that "local" and had no connection whatever with the union which filed the charges. His knowledge was certainly not knowledge of the present respondent, nor, of course, of the National Labor Relations Board. And there is not a shred of evidence that either the Board or the present respondent knew of the existence of the "locals" as separate entities, or of any office maintained by any of them, before the close of the hearings; and all the evidence in the record tends to prove the contrary to have been the case.

C. The I.B.E.W., as Such, Has No Rights Under the Alleged "Contracts."

Before turning to the question of the nature of the "contracts" involved herein and the kind of "rights" which may accrue thereunder, we may dispose of the question to whom rights may accrue under such contracts, in so far as the I.B.E.W. is concerned. And that can be done very briefly. It is the well-settled law of the State of New York that these contracts, in so far as they may constitute "property" or may give rise to any "property rights," belong to the so-called "local unions." They are not the property of the I.B.E.W., and I.B.E.W. can have no property rights thereunder. This we believe to be the general law of the land. Since, however, these "contracts" were executed in the State of New York and intended to be performed in that State, we need not go into the question of the law which may prevail in other jurisdictions. The law of the State of New York on the subject is settled and is decisive.

Wicks v. Monihan, 130 N. Y. 232.

Wells v. Monihan, 129 N. Y. 161.

Kelso v. Cavanagh, 137 Misc. Rep. 653.

World Trading Corp. v. Kolchin, 166 Misc. Rep. 854.

D. The So-Called Contracts Are Not Private Contracts.

Indeed, They Are Not Contracts at All.

The foregoing discussion assumed that we are dealing with actual contracts,—that is to say, contracts which are private agreements referring to some property rights, or rights in the nature of property rights. But such are not the "contracts" involved here. And for two reasons: First, because of the *general nature* of these "contracts." And, second, because of their *particular provisions*. We need not discuss here the problem, whether these instruments could be considered "contracts" in any aspect whatever,—for instance, in any controversy between the employers herein and the employees supposed to be covered thereby. These problems need not concern us here, for they do not arise in the case. What we are concerned with here is with the claim of "property"

or "contractual rights" in so far as it is advanced by the I.B.E.W. and its alleged "locals." As far as they are concerned, we respectfully submit, the instruments in question are not contracts at all.

(a) THE LEGAL CHARACTER OF THE ALLEGED CONTRACTS
PRIOR TO THE ENACTMENT OF THE NATIONAL
LABOR RELATIONS ACT.

Before the enactment of the National Labor Relations Act, the nature of the instruments referred to as "contracts" in the record and in the arguments of counsel was somewhat doubtful,—the doubt arising, no so much from the general nature of the "contracts," but because of specific provisions occasionally contained therein. We respectfully submit, that as to the general nature of so-called "collective bargaining" agreements there could never be any doubt, and that all doubts that ever arose were due to specific provisions conferring particular rights on individuals or groups. The "collective bargaining" agreement in itself is clearly not a "contract" but a treaty between high contracting parties,—usually an employers association on the one hand and a labor union, or aggregation of labor unions on the other.

"A labor union, as such, engaged in no business enterprise. It has not the power and does not undertake to supply employers with workmen. It does not, and cannot, bind its members to a service for a definite, or any, period of time, or even to accept the wages and regulations which it might have induced an employer to adopt in the conduct of his business. * * * It is just what it, on its face, purports to be, and nothing more. It is * * * not a contract. It comes squarely within the definition of usage. * * * 'an established method of dealing, adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force, because people make contracts with reference to it.'"

Hudson v. Cincinnati, 152 Ky. 711.

It is clear that whatever rights may be acquired by individual employees against individual employers thereunder

by reason of the "usage" established thereby, there are no legal rights flowing therefrom to the "contracting parties," so-called, by reason of its execution, unless the document contains some provision of a special nature, constituting really a separate and distinct contract from the general "code" or "usage" established for the relation of employer and employee. We need not, however, pursue this problem any further, for the reason that the National Labor Relations Act has taken the entire matter out of the domain of *private* contract and placed it within the domain of *public law*. We shall therefore proceed to examine these "contracts" under the public policy announced and the public law established by the National Labor Relations Act.

E. The "Collective Bargaining" Agreement Under the National Labor Relations Act.

It is clear that whatever may have been the law before the enactment of the National Labor Relations Act, that Act has transferred the entire problem of employer-employee relationship into the domain of public law. That does not necessarily mean that an employer may not contract with a particular employee individually. But it does mean that in so far as "collective bargaining," so-called, is concerned, parties are no longer free to contract in any way they please,—in fact, they are not free to contract at all except in accordance with its provisions. And one of the basic principles established is that collective bargaining on behalf of employees is not a private right, to be acquired by contract with an employer, but a public office to be conferred by the employees. No amount of bargaining between the Consolidated Edison Companies and the so-called "locals" could give the latter the right to make any contracts on behalf of the Edison employees.

The specific question here is whether such bargaining or the resultant "contracts" could give these "locals" any property rights. And, clearly, that question must be answered in the negative,—since collective bargaining can be done only by accredited representatives, and representation is neither

property nor a property right. A person may, indeed, have a "right" to public office, but that is neither tested nor governed by the legal rules applicable to property and contracts. They belong to a wholly different domain of the law. That domain of the law is now covered by the National Labor Relations Act. And it is clear that under the National Labor Relations Act no labor union can acquire the right of representation by contract, in the sense that such a contract may supersede, or take the matter out of, the supervision of the public authority charged with the enforcement of the Act, or give the "representatives" rights not granted to them by the Act. And in any event, such rights would not be private rights.

F. The Instruments Themselves Do Not Give to the Labor Union Petitioners Any Property or Rights in a Legal Sense.

We respectfully submit that no matter by what law the instruments referred to as "contracts" in this discussion are tested,—whether by the law now applicable to them under the National Labor Relations Act, or the law which prevailed before that Act, and no matter what view of that law we take,—there is nothing in these instruments which gives to the "labor union" petitioners either any property or any property right to which the ordinary law protecting property and property rights might attach. An examination of these instruments will show that each of them commences with the statement:

"Witneseth: That for the purpose of entering into such a basis agreement as to rates of pay, hours of work, and conditions of employment, and as to the methods of conducting collective bargaining between the parties as to questions which may from time to time arise, as will best promote and improve the economic welfare of employees of the Blank Company who are members of the Brotherhood and enable the Blank Company efficiently and economically to perform its obligations as a public utility and to furnish uninterrupted gas service in its territory the parties hereto agree with each other as follows:"

This introductory paragraph is followed by numerous provisions none of which confer any property rights upon the so-called "locals" except the right of bargaining collectively on behalf of Consolidated employees. Clearly, that would not have been a property right even before the enactment of the National Labor Relations Act. And since the enactment of the National Labor Relations Act the existence of these "contracts" makes no difference with respect to the right of representation. Either the "locals" are *bona fide* labor organizations, in which event they have the right of representation as to their members anyway, within the limitations of the Act. Or they have no such rights under the Act, in which event these "contracts" cannot confer that right upon them.

Clearly, the arguments from "contract,"—and the argument from "due process" because of the so-called "contracts,"—are wholly irrelevant to the case.

POINT IX.

The order of the National Labor Relations Board was proper in every respect, and the decision of the Circuit Court of Appeals upholding the same was correct.

The National Labor Relations Board found three kinds of unfair labor practices indulged in by the employers herein: (1) labor espionage; (2) discharges of employees because of union activities; and (3) discouragement and prevention of self-organization on the part of their employees by coercing them into joining pretended labor unions, which would result in the control of their relations by others than representatives of their own choosing, really the nominees of their employers. The unfair labor practices with respect to the discharge of certain employees, presented a simple problem.—this evil being subject to correction by direct order of reinstatement and back pay. The other two evils could be corrected only through "cease and desist" orders. Espionage being in its nature secret, there was nothing tangible to which

the Board could attach its order; and the Board was, therefore, compelled to limit itself to a general admonition by way of an order to the employer "not to do it again."

On the other hand, the interference with the employees' right to self-organization had assumed the concrete form of alleged "contracts," claimed to have been entered into between the employers and so-called "labor unions." These, as already stated, the Board found not to be *bona fide* contracts entered into in good faith, but mere devices of the employers to defeat self-organization of their employees. Clearly, the Board would have been doing less than its duty if it contented itself with merely issuing a general order directing the employers "not to do it again" but leaving untouched the instrument whereby the employers intended to defeat the right of the employees to self-organization. That such was the intention of the employers is not disputed. Indeed, the entire complaint of the "labor union" petitioners, and the principal complaint of the employer-petitioners, is, that instead of the right of the employees to self-organization being made free and unimpeded, these employees should have been hamstrung by the "contractual rights" of these "labor unions." That instead of the employees being left free to bargain collectively through representatives of their own choosing, these "representatives" should be imposed upon them by virtue of these "contracts."

In this connection the attention of the Court is respectfully called to the fact that the Board found, that, notwithstanding the formal provisions of these "contracts" that the "local unions," so-called, bargain collectively only on behalf of their own members, Mr. Floyd G. Carlisle "interpreted" the "contracts" to mean that these "local unions" were to be the sole "collective bargaining" agencies for all of the employees of the Consolidated Edison System. Indeed, that was his announced intention long before the "contracts" were in existence, and the "contracts" were entered into for the sole purpose of carrying that intention into actuality. Clearly, under the circumstances, not to remove these impediments would have been tantamount to defeating the entire purpose of the Act and a betrayal by the Board of its duty thereunder.

CONCLUSION.

The order of the National Labor Relations Board was eminently proper, and the decision of the Circuit Court Appeals in sustaining that order eminently correct. They should be affirmed.

Dated, New York, October 3rd. 1938.

Respectfully submitted,

LOUIS B. BOUDIN,
Of Counsel for United Electrical and
Radio Workers of America, C. I. O.,
Respondent.